

**THE PRINCIPLE OF *UBERRIMAE FIDEI* IN INSURANCE
CONTRACTS:**

**ANALYSIS OF HEALTH INSURANCE CONTRACTS AND THEIR
LEGAL IMPLICATIONS ON PERSONS LIVING WITH HIV/AIDS
IN TANZANIA**

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TANZANIA**

By

Kanje, Aden Adolf

**A Dissertation Submitted in Partial Fulfilment of the Requirements for the Award
of Master of Laws (LL.M) Degree of Mzumbe University**

2015

CERTIFICATION

We, the undersigned, certify that we have read and hereby recommend for acceptance by the Mzumbe University, a Dissertation entitled: **“The Principle of *Uberrimae Fidei* in Insurance Contracts: Analysis of Health Insurance Contracts and Their Legal Implications on Persons Living with HIV/AIDS in Tanzania,”** in partial/fulfillment of the requirements for award of the degree of Master of Laws (LL.M.) of Mzumbe University.

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Internal Examiner

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I, **KANJE, Aden Adolf** do hereby declare that this Dissertation is my own original work and that it has not been presented and it will not be presented to any other University for similar or any other award.

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To all I ascribe, as is most justly due, much of the credit for this Dissertation but the responsibility for any error of commission or omission is entirely mine and remains mine alone.

DEDICATION

I dedicate my dissertation work to my family. A special feeling of gratitude to my loving parents, Adolf Malimali Kanje and Hyasinta Shirima Kanje whose words of encouragement ring in my ears. My wife and son who have supported me throughout the process.

LIST OF ABBREVIATIONS AND ACRONYMS

AAR	African Air Rescue
AC	Appeal Cases
AIDS	Acquired Immune Deficiency Syndrome
All.E.R.	All England Law Reports.
ARVS	Antiretrovirals
Burr	Burrill's Law Report
C. J.	Chief Justice.
Cap	Chapter (of the Laws of Tanzania series)
Ch. D	Chancery Division
CHF	Community Health Fund
E. A.	East Africa.
E.A.L.B.	East Africa Literature Bureau.
HIV	Human Immunodeficiency Virus
HMO	Health Maintenance Organization
Ibid.	Ibidem.
Ltd.	Limited.
MBOM	Medical Benefits Management Organization
MOHSW	Ministry of Health and Social Welfare
MOLE	Ministry of Labour and Employment
MOU	Memorandum of Understanding
NGO	Non Governmental Organization
NIC (T.), Ltd	National Insurance Corporation of Tanzania Limited.
OOP	Out of pocket payment
Op. cit.	Opera citato.
PMO-RALG	Prime Minister's Office-Regional Administration and Local Government
SHIB	Social Health Insurance Benefits
TACAIDS	Tanzania Commission for AIDS
TIRA	Tanzania Insurance Regulatory Authority

LIST OF STATUTES

HIV and AIDS (Prevention and Control) Act, [No. 28 of 2008]

Insurance Act No. 10 of 2009

Law of Contract Act [CAP 345 R.E. 2002]

National Health Insurance Fund Act, [Cap 395 R.E 2002]

Social Security (Regulatory Authority) Act, 2008

Tanzania Commission for AIDS, Act No. 22 of 2001

The Constitution of the United Republic of Tanzania, 1977 [Cap 2 R.E. 2002]

REGULATIONS

The HIV and AIDS (Counseling and Testing, Use of ARVs and Disclosure) Regulations, 2010

The Insurance Regulations, 2009

POLICIES

National Health Policy, 2003

National Health Policy, 2007

National Policy on HIV/AIDS, 2001

LIST OF CASES

Bell v Lever Bros Ltd (1932) AC 161

Carter v Boehm (1766) 3 Burr 1905

Co-operative Insurance Company Ltd v David Wachira Wambugu CA Civil Appeal
No. 66 of 2008

Glicksman v Lancashire and General (1927) A.C. 139.

Jubilee Insurance Co. Ltd v. John Sematongo (1965) E.A. 233.

London Assurance v Mansel (1879) 11 Ch D 363

Rozones v Baven (1928) 32 R.98

William Okoth Abath v Pioneer Assurance Company Ltd (2016) eKLR

Wilson V Scottish Insurance (1920) 2 Ch 28

Witewell v Auto Car Fire (1927) 2 LR 413

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ABSTRACT

The focus of this research is on the principle of *uberrimae fidei* in insurance contracts: analysis of health insurance contracts and their legal implications on persons living with HIV/AIDS in Tanzania. The study seeks to make analysis of health insurance contracts and their implications on persons living with HIV/AIDS in Tanzania. The rule, technically known as *uberrimae fidei*, is very fundamental as far as insurance contracts are concerned. Despite its role in such contracts, it has caused numerous problems to the insured persons especially those living with HIV/AIDS. This paper reveals the unfortunate truth that the problems encountered by innocent health insurance proposers, who relied on human rights for persons living with HIV/AIDS, are root-based in the health insurance legal regime in Tanzania, which does not provide sufficient protection to the policy holder against insurers, who relied on that principle of *uberrimae fidei*, in their intermediation between the insurers and the insured. The law is not clear or has a gap as to what to observe between the principle of *uberrimae fidei* at the time of the formation of the health insurance contract or the rights of persons living with HIV/AIDS who wishes to have their health insured. The gap brings about the breach of those rights as some of the health insurance providers demands disclosure of information which led to the breach of those rights.

Though the Insurance Act was enacted with liberal spirit as it claimed, it fails to strike a balance between the interests of various stake holders in the field of insurance that is between the applicants or proposers or insured who are HIV/AIDS victims and the insurers. Consequently, the protection of the policy-holders, which is the apparent primary objective of the Insurance Act, is compromised in this regard. That is to say the laws create a weaker part (health insurance proposer) and a stronger part (the insurer). That situation caused the weaker part to the health insurance to suffer or to be forced to compromise even when it comes to the fundamental rights of the health insured proposer.

The research involved library research so as to lay down a theoretical framework of the research. Internet and field research also helps in providing some relevant materials in that regard. Data was collected through oral interviews and questionnaires. In which case the study found out that the law is silent on how persons living with HIV/AIDS are supposed to do or what to disclose and what not disclose regarding their health status when they need to inter into health insurance contracts.

The researcher recommends that amendments of laws should be done so to protect the interests of persons living with HIV/AIDS when it comes to health insurance on the aspects of disclosure of their health status. These includes having some provisions of the laws which will provides specifically that in case persons living with HIV/AIDS wishes to have his or her health insured especially with private health insurance companies or schemes it should not be necessary for him or her to compulsorily undergo HIV/AIDS testing or in case of involuntary testing then there should be redress towards that person.

CHAPTER ONE

GENERAL INTRODUCTION, BACKGROUND AND PRELIMINARY INFORMATION

1.1 General Introduction

Insurance contract is one of contracts based upon the principle of *uberrime fidei*, which means, utmost good faith¹. It is applicable in insurance contracts in the sense that parties to an insurance contract must deal in good faith, making a full disclosure of all material facts in the insurance contract. These kinds of contracts are different from those contracts which are based upon legal principle that let the buyer beware (*caveat emptor*).

Health insurance schemes are designed to facilitate the beneficiaries to access health services through a wide network of accredited quality health facilities. In Tanzania there are various health insurance schemes ranging from public or mandatory to private sectors which have been designed by the Government for the purposes of ensuring good and quality livelihood. There are conditions for a beneficiary to be eligible for health insurance scheme.

The international human rights efforts through the United Nations Universal Declaration of Human Rights forced African countries, Tanzania being one of them, to adopt human rights for HIV/AIDS victims. For example Article 1 and 2 of the Declaration are general articles, stating that all human beings are born free and equal in dignity and rights. Tanzania is a signatory to the United Nations Declaration of Human Rights. It is also one of the countries which have already signed the African convention on Human and People's Rights. It is for this reason that the rights of HIV/AIDS victims must be supported and protected. The Constitution of the United Republic of Tanzania provides

¹ *Bell v Lever Bros. Ltd* [1932] A.C. 161, 227 where it was said neither a line slip facility nor a binding authority nor an agreement to indemnify contained in a novating transaction are contracts of utmost good faith, as they are contract to insure and not of insurance.

for the right of privacy². It prohibits an abusive interference with person's private life. The article gives a right to the protection of the law against interference. HIV/AIDS has become one of the most stigmatized diseases with resultant denial, discrimination and human rights abuses. Thus the recognition of the importance of human rights in the context of HIV/AIDS started way back in 1998, when the World Health Organization (WHO) in Oslo held an International Consultation on Health Legislation, Ethics and HIV/AIDS. The above developments trigger the enactment of the HIV and AIDS (Prevention and Control) Act³ which reflects the issues of human rights for HIV/AIDS victims in Tanzania. Issues like right to privacy and confidentiality, informed consent to HIV/AIDS testing, freedom to all forms of discrimination etc., for example a person cannot be forced or compelled to undergo HIV testing unless it is done under the order of the court, or for a person who is a donor of human organs and tissues and, or to sexual offenders. Compelling a person to undergo HIV testing will be an offence under the Act⁴. On top of that the results of HIV test shall be confidential and shall be released only to the person tested⁵. Thus HIV testing is a voluntary action and the results are confidential.

This trend has left the HIV/AIDS victims at the dilemma of what to disclose and what not to, which will have the consequences in the insurance contract entered. This trend has left the HIV/AIDS victims at the mercy of the insurers, whether to compulsory disclosure or rescission of their contracts. It is further noteworthy that the enactment of the Insurance Act, 1996 followed by the Insurance Act, 2009⁶ marked the liberalization of insurance business in Tanzania and one of its primary objectives was to protect the interests of the policy holders. With this trend does the Insurance Act meets its purpose? So, the question to be asked is whether the Act or health insurance regime in Tanzania sufficiently provides protection to HIV/AIDS victims against such confusion of laws.

² Article 16 of the Constitution of the United Republic of Tanzania, 1977.

³ Act No 28 of 2008

⁴ *Ibid*, S. 15

⁵ *Ibid*, S. 16

⁶[CAP 394 RE 2002].

This work is divided into six chapters; Chapter 1 is comprised of the general introduction, background and preliminary information. Chapter two is on conceptual frame work whereby key concepts and their link to this study are explained. The analysis of the existing legal and institutional framework for health insurance contracts is covered in Chapter 3. Chapter 4 deals with the applicability of the doctrine of *uberrimae fidei* in insurance contracts generally. Chapter 5 contains the analysis of health insurance contracts and their legal implications on persons living with HIV/AIDS in Tanzania. Chapter 6 contains a summary of the findings, reflections, general conclusion and recommendations.

1.2 Background to the Problem

In human life, there are various social situations that cause the livelihood to be categorically in some of the life manners, in this regard, social security schemes and other social welfare matters are very much important aiming at good and quality livelihood. So in the Tanzania there are various means of gaining benefits according to the need of the individuals thus there are various social security schemes. Health insurance is one of those arrangements established for the sake of health services.

Health insurance warrants special attention due to its unique nature and the important role it plays in the Tanzania insurance landscape. It is the single biggest usage category and the best known and most needed product among the population at large. Whereas the two main parties in other classes of insurance are insurers and distribution channels, the health insurance market also includes a service (healthcare) provider as key link in the value chain. In addition Government involvement in healthcare provision, subsidisation and social health insurance are important elements in health insurance sector. Prior to trade and economic liberalisation, healthcare services were solely financed by the national budget⁷. In 1993 the Tanzanian Government decided to

⁷ World Bank, (2001). Marketing Health Financing Work for Poor People in Tanzania: A Health Financing Policy Note

introduce user fees as an additional financing source. This decision was made in light of an increase in treatment costs and the overall poor performance of the economy. Since the introduction of user fees, uninsured households are required to make out of pocket payments at healthcare facilities.

In Tanzania, there is growing commitment to the expansion of health insurance to achieve a “universal health system, whereby all those needing care can access affordable services. The largest scheme, the National Health Insurance Fund (NHIF), was set in 2001 as a mandatory scheme, offering a comprehensive benefit package for public servants. The scheme is currently reaching out to members of the private formal sector. The NHIF is administered by an independent body answerable to the Ministry of Health and Social Welfare. Another scheme, the Social Health Insurance Benefit (SHIB) was formed in 2005 as an independent body within the National Social Security Fund (NSSF), which is one of the largest pension funds in the country. It offers health insurance to NSSF members. There is also a range of private health insurance schemes. Strategies and African Air Rescue (AAR) are among the largest private insurance schemes in the country. Health insurance cover has been gradually increasing among the Tanzanian population since its introduction over a decade ago.

The insurance principles like *uberrimae fidei* are mostly applicable in health insurance contracts especially when it comes to the provision of health insurance in Tanzania by those private schemes. The principle may pose as problem or challenge when it comes to some of vulnerable groups like poor people or HIV/AIDS victims. The reason behind is due to the fact that there are human rights for HIV/AIDS victims.

The United Nations Universal Declaration of Human Rights manifestly carries on hand an imprint of the HIV/AIDS victims. The Declaration was adopted by the General Assembly on 10th December 1948 has altogether 30 articles covering both civil and political rights and economic, social and cultural rights. Articles 1 and 2 of the Declaration are general articles, stating that all human beings are born free and equal in

dignity and rights. The civil and political rights which are set out and recognized in articles 3 to 21 provide *inter alia* for the right to life, liberty and security of person; freedom from slavery and servitude; freedom from torture or cruel, inhuman or degrading treatment or punishment; and the right to recognition as a person before the law.

African Governments accepted the United Nations Universal Declaration of Human Rights. In article 3 to 19 of chapter 1 part 1 the African Convention on Human and Peoples' Rights in Africa reiterates the same rights and freedoms as are recognized and protected under the United Nations Declaration of Human Rights. Article 30 of chapter I part II provides for the establishment of an African Commission on Human and peoples' Rights within the A.U whose function shall be to promote human and people's rights including the rights of the HIV/AIDS victims. Tanzania is a signatory to the UN Declaration of Human Rights. It is also one of the countries which have already signed the African convention on Human and people's Rights. It is for this reason that the rights of HIV/AIDS victims must be supported and protected.

The constitution of the United Republic of Tanzania provides for the right to privacy⁸. It prohibits an abusive interference with person's private life. The article gives a right to the protection of the law against interference. It is now internationally accepted that the application of relevant human rights freedoms reduces both vulnerability to infection by HIV and the impact on those already infected and affected. Thus, the protection and promotion of human rights must be integral components of all responses to the HIV/AIDS epidemic. In Tanzania, the HIV/AIDS epidemic is still escalating with about one million people out of the estimated population of thirty million already infected. HIV/AIDS has become one of the most stigmatized diseases with resultant denial, discrimination and human rights abuses⁹.

⁸ Opcit, Article 16

⁹ Kinemo, R (1998) Human Rights for HIV/AIDS victims in Tanzania

The recognition of the importance of human rights in the context of HIV/AIDS started way back in 1988, when the World Health organization (WHO) in Oslo held an International Consultation on Health Legislation, Ethics and HIV/AIDS. This meeting advocated for the bringing down barriers between people who were infected and those who were not infected and placing actual barriers e.g. (condoms) between individuals and the virus.

The above developments necessitated Tanzania to enact the law that will comply with international standards which will create uniformity in dealing with human rights for HIV/AIDS victims. The uniformity was aimed by those international stakeholders. The HIV and AIDS (Prevention and Control) Act¹⁰ which reflects the issues of human rights for HIV/AIDS victims in Tanzania was then enacted. The following issues are now addressed by the Act, issues like right to privacy and confidentiality, informed consent to HIV/AIDS testing, freedom to all forms of discrimination etc., for example a person cannot be forced or compelled to undergo HIV testing unless it is done under the order of the court, or for a person who is a donor of human organs and tissues and or to sexual offenders. Compelling a person to undergo testing will be an offence under the Act¹¹. On top of that the results of an HIV test shall be confidential and shall be released only to the person tested¹². Thus HIV testing is a voluntary action and the results are confidential. This situation poses as a problem when it comes to health insurance contracts especially with the application of the principle of *uberrimae fidei*.

1.3 Statement of the Problem

Untrue statement of fact made by one party to the other which was intended and did induce the later to enter into the contract, constitutes a misrepresentation or fraud¹³. The remedy available in case of fraud or misrepresentation is to the effect that the contract

¹⁰ Act No 28 of 2008

¹¹ *Ibid*, S. 15

¹² *Ibid*, S. 16

¹³ See section 17 and 18 of the Law of Contract Act, Cap 345 R.E. 2002

becomes voidable at the option of the party whose consent was so caused. But the contract will not be voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Parties to the insurance contracts are bound to disclose all material facts and must not misrepresent any material fact relating to the insurance.¹⁴ This means that insurance contracts are contracts *uberrimae fidei*. Failure by one party to abide by this principle constitutes a misrepresentation and thus entitles the innocent party to avoid the contract. When it comes to health insurance contracts the same principle applies. However the problem comes with the operation of other laws such as the HIV and AIDS (Prevention and Control) Act¹⁵ and the Constitution of the United Republic of Tanzania.¹⁶ The Act¹⁷ provides that HIV testing is voluntary. Thus a person cannot be forced or be compelled to undergo HIV/AIDS testing unless it is done under the order of the court, or for a person who is a donor of human organs and tissues or to sexual offenders. Compelling a person to undergo testing, contrary to those exceptions is an offence under the Act.¹⁸ Moreover the results of an HIV/AIDS test are confidential and are released only to the person tested except under certain situations like in case of a child, they can be released to the victim's parent and sometime to recognized guardian. On those circumstances where such results involved a person who is unable to comprehend the results, they can be released to the victim's spouse and sometime to the victim's guardian. In case of a victim who is in relationship to a spouse or his sexual partner. The court also can require a disclosure of such results.¹⁹ Thus HIV/AIDS testing is a voluntary action and the results are confidential. This trend has left the HIV/AIDS victims or insured at the dilemma of what to disclose and what not to, which will have the consequences in the

¹⁴Semu, Thomas., "The Application of Doctrine of *Uberrimae Fidei* in compulsory Third Party Motor Vehicle Insurance in Tanzania: Law and Practice" LL.M Dissertation of University of Dar es Salaam, 2004 p 8.

¹⁵ Act No 28 of 2008

¹⁶ Cap 1 R.E. 2002

¹⁷ Act No 28 of 2008

¹⁸ *Ibid*, S. 15

¹⁹ *Ibid*, S. 16

contract entered or to be entered. Thus insured claims are sometimes repudiated successfully by the insurers due to their having relied upon their rights guaranteed by the laws of the country as explained above and sometimes the HIV/AIDS victims are forced to have their health status disclosed contrary to law.

From the above observation, the question to be investigated is the safeguards towards the health insurance proposers who are living with HIV/AIDS when they want to enter into health insurance contracts and the position or interests of the insurers.

1.4 Research Hypotheses

- (i) Whether the health insurance regime and insurance laws in Tanzania explicitly respects and protect people living with HIV/AIDS on their right to confidentiality over their health status.
- (ii) Whether the health insurance regime and insurance laws in Tanzania are in conflict with laws that protect the right to confidentiality to people living with HIV/AIDS.
- (iii) Whether the HIV and AIDS (Prevention and Control) Act does not provide for the exceptions as to confidentiality and duty to compulsory testing which covers people living with HIV/AIDS when entering into health insurance contracts.

1.5 Objectives of the Study

1.5.1 General Objective

The foremost objective of this research is to appraise the applicability of the principle of *uberrimae fidei* in health insurance contracts to persons living with HIV/AIDS.

1.5.2 Specific Objectives

- a) The study aims specifically analyze the practice in Tanzania in offering health insurance to people living with HIV/AIDS.

- b) Also the researcher is going to examining the provisions of law authorizing confidentiality, privacy and voluntary testing towards people living with HIV/AIDS over their health status within the HIV and AIDS (Prevention and Control) Act. Such provisions that are going to be examined are sections 15, 16, 17, 18, of the Act.
- c) Furthermore the researcher is going to examine the relevance of the right to confidentiality, privacy and voluntary testing within the context of the HIV and AIDS (Prevention and Control) Act.

1.6 Significance of the Study

Significantly, this work provides a clear study of that part of the formation of the insurance contract whereby the protection of the applicant or persons living with HIV/AIDS against insurers in their daily dealings will be discussed. That is to say, in dealing with the proposers, the insurer is likely to rely solely upon the proposer's or applicant's knowledge as to his health status. The insurer is not in a position to know or to be informed of the unknown facts concerning the applicant's health status.

The Insurance Act, 2009²⁰ and health insurance regime in Tanzania in general determines the rights of the insurer and the insured. But with the operation of other laws as explained herein above the insured might find himself in unsecured position. Especially to those who are HIV positive and as a result, when it comes to a discovery of such facts which were in the knowledge of the applicant but never disclosed to the insurer, the protection of such policy holders, which is the express primary objective of the Act and insurance regime, through its body, known as Tanzania Insurance Regulatory Authority, is compromised.²¹ Thus, this study is expected to bring into line

²⁰Act No 28 of 2008

²¹ The said protection is expressed in precise terms under Section 6(1) of the Insurance Act 2009, where it is provided that "the function and duties of the Authority shall be to promote and maintain an efficient, safe and stable insurance market for the benefit and protection of policy holders".

the current doubts as regards the protection of proposers or applicants of insurance who are HIV/AIDS victims/patients against the insurers and the other way round.

1.7 Literature Review

Various authors wrote on the law of insurance. They, amongst other issues, dealt with the principle of utmost good faith (*uberrimae fidei*). These authors wrote on the doctrine or principle of *uberrimae fidei*, and they generally provide a general observation on the applicability of the said doctrine without specific concern on how it affects the applicants or policy holders who are living with HIV/AIDS and the insurers.

Massawe, M.P (et al) (2012)²² provides details on utmost good faith (*uberrimae fidei*) in general. That the doctrine does attach to both sides, the insured and the insurer. The principle establishes two duties that are, duty of disclosure and duty of non-misrepresentation. The principle of utmost good faith (*uberrimae fidei*) as it is applicable is not as the principle of “*caveat emptor*” (let the buyer be ware). That means when it comes to principle of *uberrimae fidei* the owner of subject matter is assumed to be fully conversant with facts about the subject matter he wants to insure and the nature of risk he is contemplating. Thus the law establishes a duty upon the prospective insured to disclose everything that is material in relation to the contract. However, the insurers also know the details of the terms of the desired insurance agreement. They should also not mislead the prospective insured person. Thus each party to insurance contract is duty bound to reveal all relevant facts thereon. The effect of non-disclosure is as good as the effect of fraud. The writers provides a clear observation as to what the doctrine of *uberrimae fidei* entails, however, they left behind those circumstances where persons living with HIV/AIDS when entering into health insurance contracts and they did not disclose their health status to insurers. What actually happens to people living with HIV/AIDS when they are taking health insurances? What will be the impacts, though the

²² Basics of Commercial Law in Tanzania, Universities’ Tailored Handbook for Students, Karljamer Print Technology

applicants knew his health status but still failed to disclose? However, this work basically explains as to what the doctrine of *uberrimae fidei* is all about.

Birds, J (1993) in his work titled *Modern Insurance Law*²³ wrote that the doctrine of *uberrimae fidei* is applicable in contract of insurance. That before the conclusion of the contract parties to the insurance contracts must disclose material facts. The doctrine is applicable throughout the contract. It is the duty of the proposal of insurance to reveal or disclose to the insurer all material information within his knowledge. Failure of which, however innocent it is, entitles the insurer to avoid the contract *ab initio*. The writer provides how the doctrine is applicable and the consequences thereof. My concern in this study is on people living with HIV/AIDS when it comes to health insurance contracts. Whether they are able to enter into these kinds of contracts without a need to disclose their health status? The writer did not bother to go further and provide details on those circumstances that the insured are justifiable from disclosing certain facts though material.

Colinvaux, R (1970)²⁴ writes that the insurance contracts requires high standards of good faith between the parties. That is to say contracts of insurance are contract of utmost good faith (*uberrima fideis*). Both parties to a contract of insurance are under a similar duty of disclosure. However, it is the writers' observation that as the underwriter knows nothing and the one who seeks to be covered knows everything, the one desires to have a policy is required to make a full disclosure to the underwriter without being asked of all the material circumstances, failure of which it amounts to fraud. This work equally provides how the doctrine is applicable. But it fails to appreciate those circumstances where the proposer of insurance is in such a situation where he can be justifiable not to disclose or whether there are exceptions to the applicability of that doctrine.

²³ 3rd Ed. Sweet and Maxwell.

²⁴ *Law of Insurance*, 3rd Ed, Sweet and Maxwell.

Susan, H (1999)²⁵ challenges the application of the doctrine of *uberrimae fidei* that, the doctrine is prejudicial to the insured. The doctrine or rule overlooks the fact that a test of being material fact is not objective one but rather a subjective one. A fact may be material to the insurers depending on the experience of claims available to them, but not necessarily appear to be material to a proposer of insurance, even when the proposer exercises appears to be honesty and careful. Although the writer did not discuss on the protection of persons living with HIV/AIDS against insurers when it comes to the disclosure of material facts during the formation of contract of insurance, the work tries to capture those situations where there may be people living with HIV/AIDS though they are aware of their health status but opted not to disclose that fact which he/she consider not material. However the writer ignores to show the effects of that failure. Whether it will affect that person living with HIV/AIDS or not? Or whether that decision of not disclosing those facts is supported by the law or just a matter of experience?

Birds, J (2004)²⁶ briefly argues that an insurer has the right to avoid the contract of insurance in its entirety if the insured breaches or contravenes the doctrine of *uberrimae fidei* before the contract was entered. But the insurer is not always entitled to avoid the contract for such breach during the contract. However, both parties are duty bound to observe the said doctrine of *uberrimae fidei*. The writer is so brief in the sense that he only pointed out that *uberrimae fidei* is applicable in insurance contracts without further elaboration. What about exceptions to the principle/doctrine of *uberrimae fidei*? My concern is on people living with HIV/AIDS when entering into health insurance contracts. Are they required to disclose their health status? Failure to disclose their health, status what will be the consequences?

²⁵ Cases and Materials on Marine Insurance Law, London, Cavendish, 1999

²⁶ Birds' Modern Insurance Law, Sweet & Maxwell.

Kinemo, R (1998)²⁷ briefly argues on human rights for HIV/AIDS victims in Tanzania. Amongst the rights includes the right to privacy, confidentiality and informed consent to HIV/AIDS testing. The author provides for general overview of these rights. Thus to the author everyone has the right to his honour respected and his dignity recognised. It will be improper for interference with the private life of someone. Thus there should be voluntary HIV/AIDS testing and the privacy and confidentiality towards the results obtained. These rights are protected under the international treaties or international laws as well as domestic laws. The author however did not discuss how these rights affect the rights of persons living with HIV/AIDS when it comes to health insurance contracts. The author did not discuss what happens or exceptions in case a person living with HIV/AIDS wants to have his or her health insured and are not ready to undergo HIV/AIDS testing as required by some of private health insurance companies.

From the foregoing literatures; literatures on insurance and more specifically on the doctrine of *uberrimae fidei* and its legal implications on applicants or persons living with HIV/AIDS with special reference to Tanzania, are inadequate. The situation can be highly contributed by the fact that the insurance sector in Tanzania has not grown that much like that of other developed countries. Most of the available literatures provide the general observation of the doctrine. They did not touch on the protection of persons living with HIV/AIDS against insurers. However, the literatures perused are of much importance in this study. In that regard, this study will, however, proceed to look at the whole doctrine of *uberrimae fidei* by relying on the available literature together with the relevant laws.

²⁷ The Impact of AIDS on Agriculture; A paper presented at the Re-Regional Work on held at HOTEL JAMESON, HARARE ZIMBABWE

1.8 Research Design and Methodology

1.8.1 Research Design

This research is qualitative research that attempts to accumulate existing information and data regarding legal implications of health insurance contracts to persons living with HIV/AIDS in Tanzania with reflection to their rights to privacy and confidentiality. A key reason for doing a qualitative research was to investigate and become more experienced with the practice of offering health insurance to persons living with HIV/AIDS in Tanzania, the need of privacy and confidentiality, laws as well as institutional framework regarding health insurance to persons living with HIV/AIDS. The research utilized both descriptive and case study methods in the conduct of the study. Since the study is qualitative in nature, the data was collected by use of three methods, namely documentary review (secondary data), questionnaires and interview.

1.8.2 Research Methodology

This research will consist of data gathered from library and a field research. Library research was meant for documentary review while field research for primary data.

1.8.3 Library Research

This method solicited and gathered relevant secondary data from libraries found in Tanzania mainland. This source contained moderately substantial amount of literature concealed in textbooks, research papers, law reports and Journals, which provided a wealth of data. The researcher visited the Mzumbe University library, Ruaha Catholic University library as well as the library of the University of Dar es Saaam. The selection of these libraries was propelled by their accessibility, the availability of relevant materials needed from those libraries and the problem researched. The researcher also accesses the different web search engines, which had some relevant sites to the study in question.

1.8.4 Field Research

The researcher collected data from various sources by the use of questionnaires and oral interview. The sources involved were the National Health Insurance Fund (NHIF), the Tanzania Insurance Regulatory Authority (TIRA), the Tanzania Commission for Aids (TACAIDS), private insurance companies that offers health insurances in Tanzania, experts in insurance services and health insured people. While aiming at guiding the mode of interview the researcher employed questionnaire, because those questions focused the objectives of this research. The selection of the subjects was done in accordance with their positions in relevant sectors. Structured interview was conducted by the researcher to subjects to get the material information regarding the research.

1.8.5 Area of the Study

Since the study is mainly concern with the health insurance contracts and their implications on persons living with HIV/AIDS this research was conducted in Dar es Salaam, Iringa and Mbeya. Dar es Salaam being a leading business centre in the country, a lot of commercial activities takes place in the city. It has all necessary services ranging from governmental issued to private issued services. The responsible authorities and participants or population in this research are highly located in the city for example the head offices of TIRA, TACAIDS, various health insurance companies. Iringa and Mbeya had branches of those head offices that are located in Dar es Salaam. The researcher had access to those branches in Iringa and Mbeya helped him in collecting data. Thus all targeted sources of information for this research were found in those areas.

1.8.6 Sample Population

The following were targeted by the researcher, the holders of health insurances in Tanzania, persons living with HIV/AIDS, officials at the NHIF, TIRA, TACAIDS, health insurance companies, experts in the field of health insurance. The selection of the

above population was contributed by the fact that they were essential in this study. For instance the holders of health insurances, NHIF, TIRA and persons living with HIV/AIDS were selected because they either happen to be the beneficiaries of health insurance or the regulators or the providers or prospective applicants of the health insurance. They possess extensive experience on the field of health insurance especially on the practical aspects.

NHIF, private insurance companies, holders of health insurances helped the researcher in providing material information on the practical aspects of offering and entering into the health insurance contracts or arrangements in Tanzania. While experts in the field of law such as lawyers and insurance experts helped the researcher with extensive experience on the efficiency of the legislations that provides for legal and institutional framework that caters for health insurance in Tanzania. They offer desirable solutions to the problem due to their critical knowledge in the field of health insurance and their extensive knowledge in dealing with issues of the like.

1.8.7 Sample Size

The nature of the study is likely to influence data to be collected from the selected persons and institutions depending on the standings of each respondent on the topic under research. In the pursuit of the study the researcher consulted 50 respondents. This includes five (5) persons living with HIV/AIDS in Tanzania, Fifteen (15) people who are holders of health insurance in Tanzania, three (3) officials from NHIF, Twelve (12) officials from insurance companies in Tanzania these were the National Insurance Corporation, Jubilee Insurance Company Ltd, AAR Insurance Tanzania Ltd, one (1) official from TACAIDS and one (1) official from TIRA and Thirteen (13) experts on the field of health insurance. The sample size comes from the targeted population. Researcher was able to gather useful information regarding the study which depicts a true balance on information gathered.

1.8.8 Sampling Techniques

The researcher adopted a purposive sampling technique in conducting his research. This type of sampling is also known as non-probability sampling or judgmental or subjective sampling where the units that were investigated were based on the judgment of the researcher. Indeed, it enabled the researcher to select respondents with certain purpose to answer certain questions that represents a certain group with exclusion of other groups.

1.8.9 Methods of Data Collection

In this study both primary and secondary data were collected by the researcher. With secondary data the collection was effected through documentary review of some relevant materials such as textbooks, law reports, research reports, Articles in journals, statutes, some materials form websites. With primary data the researcher employed the following methods:

1.8.9.1 Questionnaire Method

The choice of this method was propelled by the nature of the respondents and the situation of conducting the study in general. Some of the respondents were officials who were so busy this method gave the researcher an opportunity to gather information form them. Both closed and open-ended questionnaires were employed by the researcher due to the fact that the respondents were literates who were able to read and write and knowledgeable on the field understudy.

1.8.9.2 Interview Method

Through structured and unstructured interviews the information was obtained from respondents. Majority of respondents were consulted through this method. This method gave more freedom to the respondents in answering the questions. Oral interview was more favourable because it saved time and enabled the researcher to see the respondents' demeanours towards the problem under study. Thus the respondents' opinion was easily

observed by the researcher. The nature of the problem necessitated the need of interviewing the respondents which offers the researcher a wide range and choice of respondents.

1.8.10 Presentation of Data and Analysis Techniques

The researcher resorted to qualitative approach as a technique of presenting, interpreting and analyzing data. In which the key findings were summarized from the data collected. The data which were collected by the researcher were broken into smallest meaningful units of information and categorized appropriately. Data that were collected through questionnaires were translated into symbols that are countable. The data were tabulated, coded and classified which made the analysis and interpretation useful. To achieve the objectives of this study, a researcher have employed views and recommendations from the respondents so as to make clear analysis of health insurance contracts on persons living with HIV/AIDS.

CHAPTER TWO

2.0 CONCEPTUAL FRAME WORK

In this chapter the important key concepts related to the title of under study will be defined and explained. In order to achieve the context of this study this chapter will give relevant definitions. This will help to provide a clear relationship between the principle of *uberrimae fidei* and insurance.

2.1 Meaning of concepts

2.2. The Concept of *Uberrimae Fidei*

Uberrimae fidei is a latin phrase which means utmost good faith and it can also be termed as most abundant faith. Principally this legal doctrine governs insurance contracts.²⁸ This principle is more useful in insurance. It means parties to insurance are duty bound to obey this principle. It is a common knowledge that where there is fraudulent statement by one party that induces the other to enter into a contract, this will entitle the later to repudiate the contract. However, a mere non-disclosure does not usually have a similar effect unless it amounts to fraud. But when it comes to some of the contracts the law imposes a higher standard of good faith between the parties.

With this principle it means that all parties to an insurance contract are supposed to deal in good faith. Thus they are supposed to make a full declaration of all material facts in the insurance proposal. Thus this in essence differs with the legal doctrine *caveat emptor* which means let the buyer beware.²⁹

This principle has a historic revolution. Section 17 of the Marine Insurance Act, 1906 states this principle and goes on to provide that if the utmost good faith be not observed by either party, the contract may be avoided by the other party. It thus appears indirectly

²⁸ Wikipedia retrieved onvisited on 24th November 2016 from <https://www.google.com/#q=uberrimae+fidei>

²⁹ Ibid

to impose on the parties a duty to act in good faith in their mutual dealing.³⁰ With this principle it can be said that it introduces implied terms in the insurance contracts in which case the purpose will be to achieve a fair dealing between parties.³¹ This principle or rule as I have stated herein above, was intended to prohibit applicants from withholding information and later claiming that they were not aware of it or never thought it material. Thus the rule technically seeks to prevent fraud and encourage good faith.³²

2.3 Contract

An agreement enforceable by law is a contract.³³ Thus it denotes legal consequences in case of breach as opposed to mere social arrangements which exist outside the framework of the law and which are binding only in the sense of moral obligation or social rule. Thus there are rules which relating to the formation and contents of agreements; those which relating to the enforcement of agreements and those which distinguishes between those agreements which are legally enforceable from those which are not. For a valid contract to come into existence, it must pass the test of offer and acceptance together with the conditions stipulated under the same Act.³⁴ That is to say, in determining whether an agreement is to be regarded as enforceable these should be there, intention, consideration and form. In the absence of intention of the parties to create legal consequences, consideration and if it fails to meet any special rules of evidence which are applicable then such kind of agreement will not enforced as contract.

³⁰ *MacGillivray On Insurance Law Relating To Risk Other Than Marine.*, 11th Edn, Sweet & Maxwell, Mancherster, 2008, p.435.

³¹ *Ibid.* p.436.

³² *Carter v Boem*, per Lord Mansfield, C.J 97 Eng. Rep. 1162,1164 (K.B. 1766)

³³ Section 2 (1) (h) of the Law of Contract Act [Cap 345 RE 2002]

³⁴ *Ibid* section 10

2.4 Insurance

Literally insurance denote a means of protection from financial loss. It is a form of risks management which is used a security against risk of a loss which is uncertain.³⁵ That institution which provides insurance is known as an insurer and the person ho buys insurance is known as an insured or policy holder. In this kind of relationship it involves the insured assuming a guaranteed and known relatively small loss in the form of payment to the insurer in exchange for the insurer's promise to compensate the insured in the event of a covered loss. The loss may or may not be financial loss, but it must be reducible to financial terms and must involve something in which the insured has an insurable interest established by ownership, pre-existing relationship or possession.³⁶

In essence with this kind of relationship an agreement is created and thus the insured receives a contract. This contract is called insurance policy. In this contract which equally be termed as insurance contract rights and duties or obligations of each party are stipulated. The insured will be required to pay an amount of money charged by the insurer which is called premium and in return if the insured experiences a loss which covered in the insurance contract the insured will be paid after he or she submits a claim to the insurer in that regard.

2.5 Health

This refers to level of functional and metabolic efficiency of living organism. It can also be defined to as a state of complete physical, mental and social-wellbeing. It does not merely mean the absence of disease or sickness.³⁷ Being healthy is so crucial for the human being survival. Where a person is unhealthy the need of healthcare services comes into play and so as the cost implications.

³⁵ Wikipedia retrieved onvisited on 24th November 2016 from <https://en.m.wikipedia.org/wiki/insurance>

³⁶ Ibid

³⁷ Wikipedia retrieved onvisited on 24th November 2016 from <https://en.m.wikipedia.org/wiki/Health>

2.6 The Health Insurance Contracts

This refers to such contracts which are specifically for insurance against the risk of incurring medical expenses among individuals. The contract meant to have an arrangement that will ensure that money is available to pay for the health care benefits specified in the insurance contract. Here the insured and the insurer will be supposed to enter into such contract that will cover the loss which relates with the need of healthcare services by the insured. All these are set in motion with the existence of a valid health insurance contract. In Tanzania for example these contracts are governed by the laws. There are those which are regulated under the private arrangements and those which are compulsory and regulated by the public arrangements. All of these contracts are regulated by the same principles that provides for how contract should be.

2.7 Persons Living with HIV/AIDS

These are those persons who after having undergoing HIV testing confirmed to be HIV positive. HIV/AIDS stands for Human Immunodeficiency Virus Infection and Acquired Immune Deficiency Syndrome. These conditions are caused by infection. With these infections the infected person will be at the risk of being prone to multiple infections that will weaken the human body. These persons will be at risk of falling sick so easily unlike those with strong immune system. Once affected these persons might find themselves in a situation of being discriminated in the community and consequently death for lack of sufficient or the required health and social support. Recognizing that situation the laws were enacted to protect of control the spreading of the diseases and as well for the basic rights of those affected persons.

2.8 The Relationship between *Uberrimae Fidei* and Health Insurance Contracts

The relationship between these two comes from the very nature of the need of having good faith in health insurance just like any other insurance. Taking into account the sensitivity nature of health insurance as explained herein above, the subject matter of the

health insurance contract is under the control and knowledge of the insured. With this principle in play it means good faith will be ensured and the risk of loss that might fall to the insurer will be limited or avoided.

CHAPTER THREE

EXISTING LEGAL AND INSTITUTIONAL FRAMEWORK FOR HEALTH INSURANCE CONTRACTS

3.0 Introduction

In Tanzania by virtue of the introduction of cost sharing policy, then health insurance came into existence. With this people are supposed to contribute into their health services. The contribution here is done not at the time when the service is needed but people are supposed to pay before the service is delivered. Health insurance helps in generating sufficient revenue to the health sector. It also improves the accessibility of healthcare facilities³⁸.

In Tanzania three different ministries are responsible for regulating the Health insurance system. These are; the Prime Minister's Office-Regional Administration and Local Government; the Ministry of Health and Social Welfare and the Ministry of Labour and Employment. Each insurance institution have its own scheme.

In Tanzania two major insurance schemes are dominant, these are; that which covers public servants which falls within the ambit of the National Health Insurance Fund (NHIF) and the other one which covers the informal sectors which is within the domain of the Community Health Fund (CHF). Apart from those small insurance arrangements also do exists, such as the Social Health Insurance Benefit (SHIB) under the National Social Security Fund (NSSF) as well as private insurance.

3.1 Health Insurance Contracts In Tanzania

Most people in Tanzania get health insurance through their employer or a spouse's employer, which is called group health insurance or have coverage through public health

³⁸ Health Sector Strategic Plan Iii. Dar es Salaam: MOHSW, 2008

insurance programs. Others purchase coverage on their own, in what is called the non-group or individual market. In Tanzania, there is growing commitment to the expansion of health insurance to achieve a “universal health system”, whereby all those needing care can access affordable services.

The National Health Insurance Funds (NHIF) is the largest health insurance scheme in Tanzania as a Government institution under the Ministry of Health and Social Welfare. It was established in 2001 as a mandatory scheme offering health services to formal sector employees. Health care providers under the scheme include Government and Religious facilities as well as those owned by Non Government Organizations. It was established by Act No.8 of 1999³⁹. National Social Security Fund (NSSF) also offers health insurance. Now days there are also a range of private health insurance schemes. Strategis and African Air Rescue (AAR) are among the largest private insurance schemes. With NHIF as long as applicant is an employee be it central or local Government of formal sector can benefit from the fund irrespective of his or her health status. However for an individual who wishes to benefit from the fund there are certain conditions which he or she ought to observe but not necessarily disclosing his or her health status unlike private companies⁴⁰.

The Social Health Insurance Benefits (SHIB) program is part of the seven benefits provided by the National Social Security Fund (NSSF). This Fund was established for the purpose of providing health insurance in respect of the employees of the private sector. Those employees of the formal private sector are mandatory required to be members of this Fund. However being a member or joining Social Health Insurance Benefits is an option to these employees. They are covered after being duly registered as members of SHIB. Upon contributing 6% of the gross pension as premium, the NSSF pensioners have also the entitlement to membership to the SHIB.

³⁹ Now Cap 395 R.E. 2002

⁴⁰ An employee in health insurance department of the National Health Insurance Fund offices in Iringa an Interview held at his office at NIC House, Iringa Tuesday 23rd March 2015.at 10:30 am

In Tanzania, especially in the mid to late 1990s there were reforms in health sectors that witnessed the introduction of private health insurance. However the private health insurance was highly operated by private companies. There as a very small number of people who participated in private insurance. This as seems due to some reasons are, lack of sufficient knowledge regarding private health insurance and limited services. Some of the interviewed people suggested the need of having more flexible requirements in establishing health insurance schemes so that private health insurance can get benefit of being in a position to accommodate many people with minimum risks.

3.2 The National Health Policy⁴¹

The Policy aimed at providing direction towards improvement and sustainability of the health status of all people by reducing disability, morbidity and mortality, improving nutritional status and raising life expectancy. The policy responds to HIV/AIDS epidemic which shows the National response to such epidemic by developing strategies to prevent, control and mitigate the impact of the epidemic. The policy sees the necessity of having voluntary testing. It addresses the issues of financing health services. It addresses in general terms issues of health insurance and community contributions.

3.3 The National Policy on HIV/AIDS⁴²

The Policy addresses issues of HIV/AIDS voluntary testing, confidentiality and rights of persons living with HIV/AIDS. In general it promote voluntary testing and the results be treated confidential. The rights of persons living with HIV/AIDS includes: all basic needs and all civil, legal, and human rights without any discrimination based on gender differences or sero-status. The right to seek information or counselling, treatment and care just like any other person seeking other health/social services. The right against discrimination in relation to education, employment, health and any other social

⁴¹ Ministry of Health October, 2003

⁴² The United Republic of Tanzania Prime Minister's Office, 2001

services. The rights to confidentiality and privacy as well as informed consent, so they shall be involved in counselling. The right to privacy.

3.4 The HIV and AIDS (Prevention and Control) Act⁴³ and Its Regulations⁴⁴

The Act was enacted to provide for prevention, treatment, care, support and control of HIV and AIDS, for promotion of public health in relation to HIV and AIDS; to provide for appropriate treatment, care and support using available and resources to people living with or at risk of HIV and AIDS and to provide for related matters⁴⁵. In essence the Act focuses on the rights, duties and responsibilities of persons living with HIV/AIDS as well as how to deal with issues relating to HIV/AIDS. It provides for right of privacy and confidentiality, for example testing without prior consent is prohibited under the Act, disclosing the results to third party without prior consent of the HIV/AIDS victim is also prohibited in a way breaching confidentiality is addressed by the Act.

The HIV and AIDS (Counseling and Testing, Use of ARVs and Disclosure) Regulations made under section 52 (a), (b), (c), (d) and (e) of the Act⁴⁶ which in essence meant to regulate the following; the modality of releasing HIV testing results to another person; how HIV tests will be conducted; how to report HIV tests results; how to deliver the results of HIV tests and some other important issue that concerns HIV tests.

From these two pieces of legislations no test results shall be given by any means to a person other than those authorized by the above legislations. So the two pieces of legislations in a way does not absolutely prohibit the disclosure to third party but must always be done as provided by the law. HIV testing must be conducted after prior informed consent of a person tested or of a person authorized to consent for such individual and counseling prior testing, such consent and counseling must be

⁴³ Act No 28 of 2008

⁴⁴ The HIV and AIDS (Counseling and Testing, Use of ARVs and Disclosure) Regulations, 2010

⁴⁵ Preamble to the Act

⁴⁶ Act No. 28 of 2008

documented⁴⁷. However the regulations provides thus no medical practitioner, health practitioner or any other person shall discriminate against any person due to his HIV positive status or has declined to take an HIV test.⁴⁸ Besides that the HIV testing can be done without consent of the person if the medical practitioner reasonably believes that such a test is clinically necessary or desirable in the interest of that person.⁴⁹ Thus a person cannot be forced to undergo HIV testing or the result to be disclosed to the third party without his or her prior consent.

The laws provides further that health practitioners, insurance companies etc. shall be responsible for maintaining confidentiality of the data as provided for under the Act and shall take appropriate steps for their protection⁵⁰. So the laws allow voluntary testing and confidentiality in respect of HIV/AIDS results. So in case an insurance company or health insurance provider needs a disclosure of a person's health status through giving a special form to be filed by the applicant of health insurance and the applicant voluntarily subjecting himself or herself to such arrangement it will form consent prior to testing and release of such information to insurance company. The laws failed to appreciate circumstances where the applicant of health insurance refused or unwilling to test and still want health insurance contrary to health insurer's conditions prior to provision of such services. The regulation state that such a person shall not be discriminated due to his HIV positive status or has declined to take an HIV test. Still I can see a problem with the laws because health insurance provider can still insist that every applicant of health insurance is subjected to such procedure and it is not discrimination. But someone can still argue that if someone refused to undergo HIV test and by that reason he or she is denied access towards health insurance that constitutes discrimination covered by the regulations. But also if at all the purpose of health insurance is to cover for such a person's health why should it be confidential as against such health care provider.

⁴⁷ Regulation 7 of the HIV and AIDS (Counseling and Testing, Use of ARVs and Disclosure) Regulations, 2010

⁴⁸ Ibid Regulation 9

⁴⁹ Ibid Regulation 14 (2) (b)

⁵⁰ Ibid Regulation 23 (3)

Reading other regulations as shown herein above one will note that a medical practitioner can still test HIV/AIDS status of a person if he consider it necessary in the interest of that person and informs other medical practitioners directly involved or about to be involved in the treatment or care of a person living with HIV and AIDS. The test of interest of the person to be tested is unknown. The rights of the HIV/AIDS victims can still be violated by the reason that medical practitioners consider it necessary in the interest of that person. No wonder health insurance providers require disclosure of applicant's health status directly through laboratory or medical practitioners which that person is directed to attend for test. The practice of accessing the results directly from the laboratory that have the link with the health insurance providers creates a compulsory or involuntary HIV testing provided that such person is in need of health insurance. Here the proposer being a weaker part then he or she is forced to ignore his or her rights for the sake of the health insurance contract.

3.5 The National Health Insurance Fund (NHIF) Act

With the enactment of this Act, the National Health Insurance Fund was officially born. This officiate the contributions to the Fund and the payment of healthcare benefits to beneficiaries of the Fund. The beneficiaries of the Fund are the government employees. The government employees are mandatorily required to join the Fund⁵¹, although there are some exceptions. The Fund is funded by the government through the government budget as well as the contributions. These contributions are deducted from the public servants' salaries. The Act generally regulate the social health insurance scheme in Tanzania especially to those ho fall within the scheme.

3.6 The Insurance Act, 2009

With the enactment of the Act, the Tanzania Regulatory Authority was officially or legally born. The Authority is vested with powers and functions that relates with the

⁵¹ See the section 6 of the NSSF Act

regulation and supervision of insurance. It can be said that this law deals with the private health Insurance. That being the case it does not deal with social health insurance. That being the case it is worth noting that this Act establishes an Authority that deals much with private insurance issues and we also have the other Authority that deals with social health insurance.

3.7 The Regulatory Authorities

Following the liberalization of the insurance market in Tanzania as can be observed herein above, the Government decided to form a regulatory organ⁵² in order to supervise the market. Consequently, the Tanzania Insurance Regulatory Authority was established. The functions and duties of the Authority is to promote and maintain an efficient, fair, safe and stable insurance market for the benefit and protection of policy holders⁵³. Apart from that the Authority, without prejudice to the main function stated above it protect the interest of policy-holder⁵⁴. By its set up the Authority operates in those principles that are applicable in insurance generally. Thus the principle of *uberrimae fidei* is observed by the Authority. The Insurance Act does not address a specific concern of special groups like persons living with HIV/AIDS when they need to insure their health. This authority deals with those private insurance companies that offer health insurances like Jubilee Insurance Company. The SSRA⁵⁵ regulates the social security schemes such as National Health Insurance Fund (NHIF) etc. that offers health insurance as schemes. Like the Tanzania Regulatory Authority (TIRA), the SSRA also protects and safeguard the interests of members.

⁵² The Insurance Supervisory Department under the Insurance Act, 1996.

⁵³ Section 6 (1) of the Insurance Act

⁵⁴ Section 6 (2) (j) Ibid

⁵⁵ Act No. 8 of 2008

3.7.1 Social Security Regulatory Authority (SSRA)

This Authority was established for the sake of regulating social security schemes. The Authority covers several health insurance schemes but it left out some of the schemes. For example the Authority does not cover those schemes which are private. It should be noted here that the Authority does not specialize on health insurance as a specific concern. The Authority does not directly deal with healthcare services providers. It has no mandate over the cost control and the promotion of quality assurance in the delivery of healthcare services.

3.7.2 Tanzania Insurance Regulatory Authority (TIRA)

This Authority deals with or was meant to regulate insurance in general. It is therefore covers health insurance as well. But with the setup of the law, this Authority specifically deals with private health insurance. It left issues of social health insurance to another authority as explained herein above.

3.7.3 The TACAIDS

Tanzania Commission for AIDS (TACAIDS) is an Independent Department under the Prime Minister's Office, established by the parliament through Act No. 22 of 2001 and mandated as the overall National coordinator of the National Response to HIV and AIDS. TACAIDS provides strategic leadership and coordination of HIV and AIDS interventions in the country. The Commission is also responsible for resource mobilization for the national response through various fund-raising initiatives like the development of the Global Fund country proposals and negotiation with Development Partners through different approaches like pooled funding mechanism (NMSF). These funds are disbursed to implementers across the country. Monitoring and Evaluation is another key mandate of the commission. The National Multisectoral Monitoring and Evaluation System for HIV and AIDS provides information on progress towards set national targets and facilitates planning of future actions for appropriate response to the

epidemic. Section 5 (1) (k) of the Tanzania Commission for Aids Act⁵⁶ provides that one of the functions of the Commission is in collaboration with relevant sector protect human and communal rights of people infected with and affected by HIV/AIDS.

This Authority gives an insight of how the rights of these persons living with HIV/AIDS are protected. It can be used to educate the stake holders in health insurance regime in Tanzania in order to find a balance between the parties to health insurance contracts. This Authority can do so by cooperating with other Authorities such as TIRA and SSRA. This can mean with the harmonization of the interests of both stake holders in health insurance regime a clear position will be set. That if the NHIF or NSSF under the control of SSRA offers health insurance without necessary interference with the rights of persons living with HIV/AIDS even the private health insurance under the control of TIRA can still do the same. These double standards can be removed with the harmonization of these two sides.

3.8 The Right to Privacy and Confidentiality in healthcare for persons living with HIV/AIDS

Medical information about a person is particularly sensitive and patients must feel certain that it will be protected and not used or shared in inappropriate ways. Concerns about confidentiality can be even more acute for people with stigmatized conditions, such as HIV. Persons living with HIV may have a range of concerns about their confidentiality, for example fear that someone in their community might discover their HIV status. There may also be concerns about HIV-related discrimination.⁵⁷ It is understandable that persons living with HIV might want access to their information to be restricted to those directly involved in their care and on a “need to know basis”.

⁵⁶ Act No. 22 of 2001

⁵⁷ Elford J et al, “HIV-related discrimination reported by people living with HIV in London, UK”, AIDS and Behaviour,

The need of confidentiality in healthcare has a long history. Under common law medical professional is obliged to keep personal information about a patient confidential and is only entitled to share that information about in two situations: with the patient's consent or if the disclosure is in the public interest. A patient is generally assumed to have implied their consent to their information being shared with another healthcare professional for their treatment or care.

A patient has the right to have privacy towards his or her health status. The disclosure of ones health status is upon that person whether to disclose or not. Thus persons living with HIV/AIDS cannot be forced to disclose their health status.

The above detailed development on human rights for HIV/AIDS victims as explained herein above triggers National response towards HIV/AIDS. For example sectoral strategies, like the Tanzania's Commission for AIDS (TACAIDS) and National AIDS Control Programme were formed to coordinate those strategies and campaigns against HIV/AIDS at the national level. As a country these programs or framework are regulated by National Policy on HIV and AIDS and the HIV and AIDS (Prevention and Control) Act⁵⁸. For instance the Act reflects the issues of human rights for HIV/AIDS victims in Tanzania. Issues like right to privacy and confidentiality; informed consent to HIV/AIDS testing; freedom to all forms of discrimination etc.

Thus on the right to privacy and confidentiality, every person directly affected by the epidemic has a right to confidentiality and privacy. The doctors, health workers and carers have no right to diverge one's HIV sero status to other parties. On top of that person living with HIV/AIDS cannot be forced to disclose his or her health status. A breach of these rights can only be done in exceptional circumstances like when demanded by the court of law or in the case of terminal illness or death to the next of kin. The ethical aspect of this is the exposure of spouses who may then be infected by their husband/wife/sex partner who may or may not know their HIV sero status, or while

⁵⁸ Act No 28 of 2008

knowing it might not want to tell their spouses or sex partners. The basic question however is if a person's confidentiality may be broken for the sake of others who may have a right to know, like spouses or, carers in the home? Here there is a call for shared confidentiality⁵⁹.

HIV testing without consent is prohibited by both International and National AIDS Control Programmes. It means that no person should be tested for HIV/AIDS without his prior informed consent. Moreover, this informed consent must be accompanied by Pre- and post test counseling. Besides ethical violation, HIV testing without consent may amount to trespass to the victim.

3.9 Conclusion

The contract of insurance is governed, *inter alia*, by the principle of *uberrimae fidei*. This principle distinguishes the insurance contract from other types of commercial contracts. Parties to a contract of insurance must disclose all material facts and must not misrepresent any fact material in particular relating to the subject matter of the insurance. If either party to the insurance contract fails to abide by the principle entitles the innocent party to avoid the contract. Rationale behind the principle is to make sure that there is no fraud in insurance contracts and it also encourages good faith. The insurance industry (insurance regime) especially in Tanzania includes or involves a bunch of laws which sometimes creates some sort of a confusion as to what ought to be disclosed and what should not especially when it comes to those persons living with HIV applying for the health insurance. This work will discuss that dilemma as to whether such information is material and needed to be disclosed and failure to do so will warrant the insurers to avoid the contract *ab initio* or the private nature of such information or the voluntariness nature of HIV testing protects the insured from the insurers from any attempts to avoid the contract?

⁵⁹ Section 16 of Act No 28 of 2008

CHAPTER FOUR

THE APPLICABILITY OF THE DOCTRINE OF *UBERRIMAE FIDEI* IN INSURANCE CONTRACTS GENERALLY.

4.0 Introduction

In most commercial contracts parties can examine the item or service which is the subject matter and conclude the transaction. Such types of contract are governed by the doctrine of *caveat emptor*; i.e., let the buyer beware. In such contracts there is no need to disclose information which is not asked for and a party cannot avoid the contract so long as he was not misled by the other party and the questions put forward by him were truthfully answered.⁶⁰

The principle of Utmost Good Faith (*uberrimae fidei*) is fundamental. In health insurance, one party (the proposer) is considered to be in possession of all the facts on which the liability of the insured will be based. The insurer must generally rely on the proposer for the knowledge of these facts, which will include family history, personal medical history, occupation and habits. Practice shows a health insurance is not a yearly contract. It is entered into for a term of years, with an option to renew or terminate at each premium due date. This option is available only to the policy holder. This creates an unequal position that has to be addressed in any form of contract. Thus, the principle of *uberimmae fidei* on the part of the proposer is of the utmost importance to the negotiations in health insurance. *Uberrimae fidei* likewise also applies to the insurers. This principle applies also to the duty of disclosure regarding its duration to insurance concerned and material facts which must be disclosed and those which need not be disclosed. In general, failure to exercise the principle of *uberrimae fidei* enables the aggrieved party (the party which shall suffer an unjust financial loss), to repudiate

⁶⁰ Semu, Thomas., "The Application of Doctrine of *Uberrimae Fidei* in compulsory Third Party Motor Vehicle Insurance in Tanzania: Law and Practice" LLM Dissertation of University of Dar es Salaam, 2004, p27

(cancel) the contract or to treat it as null and void ab initio (right from the beginning). Although the contract is binding on both parties alike, it usually arises out of the conduct of the proposer, or insured. An insurer must disclose the precise terms and conditions of the contract that he offers, and must not take advantage of the ignorance of the proposer⁶¹.

The general law governing the contract of insurance is the law of Contract Act⁶² and the Insurance Act⁶³. With regard to the formation of the contract of Insurance there are two parties. (i) The Insurer who is to cover the possible risk and (ii) Insured or assured who wishes to have protection over a particular risk on payment of premium. Insurance is governed with number of principles which are also used in determining the rights of the parties to the contracts. These principles affect from the formation of contract of insurance, and its enforcement as well⁶⁴. Amongst the principles, utmost good faith (*Uberrimae fidei*) is one of them. Insurance contract is therefore a contract of utmost good faith and it does attach to both the insured and insurer. This principle establishes two duties: (i) duty of disclosure and (ii) duty of non misrepresentation⁶⁵.

However, due to the nature of the contract of insurance, one party is placed in a relatively stronger position to know the facts which are material to the contract than the other party who is in a weaker position to discover them. This being the case, the former is under a duty not only to avoid making false representations of material facts but also to disclose, in utmost good faith, such material facts as are or ought to be within his knowledge to the other party. These contracts are commonly described as contract of *uberrimae fidei*. The effect of this doctrine is that any non-disclosure and, or material

⁶¹ <http://www.cifplearning.com/introduction%20of%20life%20insurance.pdf> visited on 18th October 2014

⁶² Cap 345 R.E 2002

⁶³ Insurance Act 2009

⁶⁴ Ombella and Massawe, Massawe, M.P and Ombella, J.S Basics of Commercial Law in Tanzania: Universities' Tailored Handbook for Students, Dar es Salaam.

⁶⁵ *Ibid* p.327

misrepresentation, whether or not intentional, will allow the underwriter to avoid the insurance contract *ab initio*.⁶⁶

In the case of **Wiliam Okoth Abath versus Pioneer Assurance Company Limited**⁶⁷ the High Court of Kenya on the doctrine of *uberrimae fidei* observed that:-

“...it is important to understand the nature of the doctrine of utmost good faith in the law of insurance. The principle of utmost good faith, expressed by the Latin maxim ‘uberrima fidei’, meaning fullest confidence, is regarded as a fundamental principle in insurance contracts. The Court of Appeal in Co-operative Insurance Company Ltd v David Wachira Wambugu CA Civil Appeal No. 66 of 2008 cited these timeless words of Lord Mansfield in Carter vs Boehm (1766) Burr. 1905; Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risqué as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement... The policy would be equally void against the underwriter if he concealed... The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary...”

In other words in insurance contract, the owner of subject matter is assumed to be fully conversant with facts about the subject matter he want to insure and the nature of risk he is contemplating. The proposal of the health insurance is better placed in a strong position due to the fact that he is very much detailed of the risk to be insured than the

⁶⁶*Carter v. Boehm* 97 Eng. Rep. 1162, 1164 (K.B. 1766). (“the policy would equally be void against the underwriter if the concealed anything within his own knowledge...Good faith forbids either party, by concealing what he privately knows, to draw the other party into a bargain owing to his ignorance of that fact, and believing the contrary”).

⁶⁷ [2016] eKLR

insurer. The law establishes a duty upon him to disclose everything that is material in relation to the contract. In their disclosure he should not misrepresent the facts to the insurers. However, the insurers also know the details of the terms of the desired insurance agreement. They should also not mislead the prospective insured person. In order for this situation to be equitable, the duty of “*uberimae fidei*” is thus imposed on both parties to the contract. Although the burden rest more on the insured but also the insurer is supposed to make a full disclosure of the material facts concerning the policy⁶⁸. In **Rozones v Baven**⁶⁹ The dual duty was discussed at length and the insurer must disclose all what his policy is all about, likewise the insured.⁷⁰ For instance in case of *Co-operative Insurance Company Ltd v David Wachira Wambugu (Supra)*, Court found in favour of the insurer when it was found that a policy holder had failed to disclose that he had diabetes when taking out a life insurance policy.

However, critically, there are those kinds of insurance which by virtue of operation of other laws creates some sort of interferences or confusion. Here I am talking about health insurance towards the persons who are HIV/AIDS victims. Health insurance provides protection or coverage against the health of the policy holder. Health insurers do have the right to inquire about any material facts concerning the applicant’s healthy status.

Therefore, I will provide some details on the doctrine of *uberrimae fidei*, especially its rationale in the contract of insurance, explores facts which need disclosure and non-misrepresentation and those which need not be disclosed, as well as the effect of non-disclosure and misrepresentation in the contract of insurance. On top of that I will provide some details on the existing legal and institutional framework for health insurance in Tanzania with reflection to HIV/AIDS victims. This is to give a clear picture of what is happening in practice. Furthermore, this discussion will provide a

⁶⁸ Ombella and Massawe op cit p 328-329

⁶⁹ (1928) 32 R.98

⁷⁰ Ibid

basis for an understanding of the applicants or protection of applicants living with HIV/AIDS against insurers with reflection of the Insurance Act, 2009 and other laws in the country and whether or not the protection is adequate or in favour of those people.

4.1 Rationale of *Uberrimae Fidei* in Insurance Contract

In the famous case of **Carter v. Boehm**⁷¹ the duty of disclosure in insurance contracts was established. In that case it was stated that “insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.” This shows how contract of insurance is special one.

The rationale for the doctrine of *uberrimae fidei* include, the everyday requirement for honesty, the peculiarly aleatory⁷² nature of a contract of insurance, which calls for perfect comprehension of the risk undertaken, and commercial usage as developed in this area over the ages. Thus, it may be said that in the contract of insurance the greatest premium is placed on the basis that one must love his neighbour as himself.

The nature of insurance contract warrants some degree of good faith and honesty in order to enable the insurers have the full grasp of the subject of insurance, its attendant risk and the assessments of the appropriate premiums. In essence this necessitate the need of having this doctrine in place as in those days the means of communication was very poor and the insurers were not equipped with means easily to discover all the information they needed to know by asking questions to the proposer. Although there are some of people who think that the justification of the doctrine of *uberrimae fidei* is not so apparent today but looking at it closely one will come up with a brief conclusion

⁷¹ (1766) 3 Burr. 1905

⁷² *Blakburn v. Vigors Brothers Ltd.* (1886) 17 Q.B.D. 561

that the rationale as pointed herein above is on the need of the parties to a health insurance contract to act in good faith. It should be noted that the health insurance contract by its very nature is so special that warranty a need of utmost good faith. The insurer is not in a good position as the insured to know all the material facts regarding the subject matter of the insurance.

4.2 Facts which need disclosure and which need not be disclosed

Principally on the basis of the doctrine of *uberrimae fidei*, the insured has a duty to disclose to the insurer all material facts⁷³ within his actual or imputed knowledge which may in any way relate to the subject-matter of contract of insurance.⁷⁴ A fact is material for the purposes of both non-disclosure and misrepresentation if it is one that would influence the judgment of a reasonable or prudent insurer in deciding whether or not to accept the risk or what premium to charge or, possibly, whether to impose particular terms in the contract such as an exclusion or an excess⁷⁵.

The test of materiality, which is objective, depends initially on the opinion of a reasonable insurer. That is to say the non-disclosed fact must have had a decisive influence on the judgment of the prudent or reasonable insurer. Further to that the prudent or reasonable insurer would have wished to know about the fact when reaching his decision⁷⁶. Consequently, it is irrelevant that the insured considered a fact immaterial; and this has been described as a decisive influence test.

⁷³ S. 18 (1) reads, "Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract".

⁷⁴ Thomas J. Schoenbaun "The duty of utmost good faith in Marine insurance Law: a comparative analysis of American and English law," *journal of maritime law and commerce*, Vol 29 No 1 January 1998. P.5.

⁷⁵ John Birds, *Birds' Modern Insurance Law*, 6th Edn P.114

⁷⁶ *Ibid*

The duty to disclosure is limited between time of proposal and actual issuing of policy as it was stated in the case of **Witewell v. Auto Car Fire**⁷⁷. However, before the proposal is accepted and yet the policy is issued, new information (if any) the insured may disclose before reporting to the insurer (s). In **Wilson and Scottish Insurance**⁷⁸ it was held that:-

*“... any fresh material fact must be disclosed to insurers at each time of renewal. If insurers are connected with those material facts they can decide either to undertake the risk against or not.”*⁷⁹

It is however right that there are those facts which are not required to be disclosed to the proposer. Meaning, non-disclosure of such facts shall not be fatal to the contract of insurance. These facts includes, any fact which diminished the risk; any fact which is known or presumed to be known to the insurer; any fact which is of the nature of public knowledge of which is related to the law of the country (Judicial Notices); any fact as to which information is waived by the insurer⁸⁰. Thus those facts which would, in certain circumstances, be material but may be immaterial in special circumstances of a given case and the insured is under no obligation to disclose them⁸¹.

4.3 The effect of non-disclosure

In any case where the insured hide some facts he knows to be material, such concealment constitute fraud and the insured will be guilty of fraudulent non-disclosure. Where the insured knowingly makes a false statement, without belief in its truth or recklessly as to whether it is true or false, will be guilty of fraudulent misrepresentation. However, in any case the effect of mere non-disclosure on an insurance contract is to

⁷⁷ (1927) 2 LR 413

⁷⁸ (1920) 2 Ch 28

⁷⁹ Ombella and Massawe op cit p 330

⁸⁰ Ombella and Massawe op cit p 331

⁸¹ See Mac Gillicyary & Parkington on insurance law, *op.cit.*,149.

some extent the same as the effect of fraud⁸². The contract becomes voidable at the option of the aggrieved party.

The problem comes when the applicant or policy holder at the time of formation of the insurance contract in case of health insurance did not disclose such fact bearing in mind that such information are private as per the operation of other laws such as the HIV and AIDS (Prevention and Control) Act⁸³ and the Constitution of the United Republic of Tanzania⁸⁴ or that he was not aware of those facts due to that voluntary nature of HIV testing. These facts can be material to the insurer when entering into the insurance contract but confidential or private to the insured.

4.4 Conclusion

The doctrine of *uberrimae fidei* governs the contracts of insurance which makes insurance contracts special one as against the other types of commercial contracts. As pointed herein above, parties to a contract of insurance are duty bound to disclose all material facts and must not misrepresent any fact material in particular relating to the insurance. In case either party to the insurance contract fails to obey or follow the principle or doctrine of *uberrimae fidei* entitles the innocent party to avoid the contract. The very rationale of the doctrine is unsure that there is no fraud or misrepresentation in insurance contracts thus it encourages good faith. However, as the persons living with HIV/AIDS have their rights of privacy and confidentiality towards their health status, their status when it comes to disclosure of material facts, as to what information or facts necessary to be disclosed or not to be disclosed or whether they will be held responsible for their actions in case of non-disclosure, is unclear.

⁸² Ombella and Massawe op cit p 331

⁸³ Act No. 28 of 2008

⁸⁴ Cap 2 R.E. 2002

CHAPTER FIVE

ANALYSIS OF THE HEALTH INSURANCE CONTRACTS AND THEIR LEGAL IMPLICATIONS ON PERSONS LIVING WITH HIV/AIDS IN TANZANIA

5.0 Introduction

“HIV/AIDS victim” means a person who after having undergoing HIV testing confirmed to be HIV positive. These persons have rights and duties as results of international and national efforts. In Tanzania, by virtue of HIV and AIDS (Prevention and Control) Act⁸⁵ and the Constitution of the United Republic of Tanzania⁸⁶ their rights are protected and their duties have also been provided especially with the Act. Undergoing HIV test is a voluntary action unless, either with the order of the court, on the donor of human organs and tissues and to sexual offenders. Compelling someone to undergo HIV testing is an offence. However a medical practitioner responsible for the treatment of a person may undertake HIV test in respect of a person without the consent of that person if the medical practitioner reasonably believes such a test is clinically necessary or desirable in the interest of that person.⁸⁷ The results of an HIV test are confidential and are released to the person tested only except under certain circumstances like in case of child, to his parents or recognized guardian; in case of a person with inability to comprehend the results, to his spouse or his recognized guardian; to a spouse or a sexual partner of an HIV tested person or to the court⁸⁸. On top of that in case the results are released to be known to a medical practitioner there is always a duty to medical practitioner to hold such information confidentially⁸⁹. However this right has some exceptions in the sense that medical confidentiality will not be considered breached in informing other health

⁸⁵ Opcit

⁸⁶ Opcit

⁸⁷ Section 15 (1), (3), (7) and (8) of Act No. 28 of 2008

⁸⁸ Ibid Section 16 (1) and (2)

⁸⁹ Ibid section 17

practitioners directly involved or about to be involved in the treatment or care of a person living with HIV/AIDS. It is the Government duty to ensure that every person living with HIV/AIDS are accorded with basic health services. A person being the owner, manager or incharge of health care facility or medical insurance whether public or private has the obligation, without discrimination on the basis of the status, to make easy access to healthcare services to persons living with HIV/AIDS.⁹⁰

Health insurance in Tanzania is administered through mandatory schemes as well as private schemes or arrangements. With mandatory scheme such as the National Health Insurance Fund (NHIF) normally as the Act provides it is the duty to the Government. People join the scheme provided they are in formal employment without a need to undergo HIV/AIDS testing. Private arrangements or companies like Jubilee Insurance Company or AAR and where a person who comes from non-formal employment and want to join schemes like NHIF the tendency is that the health status of such health insurance applicant is important to be known before entering into a health insurance contract.

This chapter intends to critically analyze the health insurance contract and their legal implications on persons living with HIV/AIDS in Tanzania. In which case the rights, duties and responsibilities of the HIV/AIDS victims and of the health insurers when it comes to provision of health insurance and the effect of disclosure of their status while reflecting the practice in health insurance industry in Tanzania will be discussed in details. The discussion will look at the experience of insures, policy holders and the regulators with regard to practice in health insurance industry specifically the legal implications of health insurance contracts on persons living with HIV/AIDS in Tanzania.

⁹⁰ Section 24 (1) of Act No. 28 of 2008

5.1 Rights and Duties of HIV/AIDS Victims towards Health Insurers

Right to health is a matter of daily importance for the entire lifetime of a human being. Health is considered to be the most basic and essential asset to all people⁹¹ regardless of age, socio-economic or ethnic background. Health, on the other hand, can keep us from going to school or to work, from attending to our family responsibilities or from participating fully in the activities of our community.⁹² The right to health was recognized as a human right in the 1966 International Covenant on Economic, Social and Cultural Rights. In Tanzania for instance there is a National Health Policy of 2003 which aimed at providing direction towards improvement and sustainability of the health status of all the people, by reducing disability, morbidity and mortality, improving nutritional status and raising life expectancy. The policy recognizes that, good health is a major resource essential for poverty eradication and economic development. Recognizing that the Government has a duty, using the available resources, to ensure that every person living with HIV/AIDS... accorded with basic health services.⁹³ There are two types of health insurance in Tanzania. These are mandatory public health insurance and individual (commercial) health insurance. Beneficiaries' rights and duties depends on which type the insured has decided to join.

Generally when it comes to persons living with HIV/AIDS they have some rights as against insurers when it comes to health insurance. For instance HIV testing without consent is prohibited by both international and national AIDS Control Programmes. It means that no person should be tested for HIV/AIDS without his prior informed consent. And that this informed consent must be accompanied by Pre- and post test counselling. Except under certain circumstances for example to a child who is unable to comprehend the result, or under court order, or on the donor of human organs and tissues and to

⁹¹ The preamble of The Constitution of WHO of 1946

⁹² Right to Health Report Fact Sheet No. 1 by the Office of the United Nations High Commissioner for Human Rights at <http://www.ohchr.org/Documents/Publications/Fact-sheet31.pdf> Accessed on 07th April, 2015

⁹³ Section 19 (1) of Act No. 28 of 2008

sexual offenders or where a person is unconscious and unable to give consent and the medical practitioner reasonably believes that such a test is clinically necessary or desirable in the interest of the person. It goes without question that the information must be given in the language which is understood by the person to be tested. Besides ethical violation, HIV testing without consent may amount to trespass to the victim and it will amount to an offence.⁹⁴

The Constitution of the United Republic of Tanzania provides for the right to privacy⁹⁵. Everyone is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life and respect and protection of his residence and private communications. The article gives a right to the protection of the law against such interference or attacks. The Government has enacted the law which ensures the privacy and confidentiality on persons living with HIV/AIDS. Thus, every person directly affected by the epidemic has a right to confidentiality and privacy. The doctors, health workers and carers have no right to divulge one's HIV sero status to other parties. It can only be breached in exceptional circumstances like when demanded by the court of law or in the case of terminal illness or death to the next of kin.

In essence, on theoretically point of view, persons living with HIV/AIDS are not supposed to compulsorily disclose their health status. However, practically are forced to do for the sake of health insurers' interests. One would ask if it is so important to disclose the health status of person living with HIV/AIDS for the reason that health insurer would use that to determine amount of risk before issuance of the policy why then there is double standard in health insurance regime. The need of HIV testing is needed when it comes to private health insurance unlike compulsory health insurance schemes. The private health insurance providers can still offer health insurance just like how it is done by the compulsory health insurance regime like the NHIF or NSSF.

⁹⁴ Section 15 of Act No. 28 of 2008

⁹⁵ Article 16

5.2 Policy Holders' Experience

The basic question however is if a person's confidentiality may be broken for the sake of others who may have a right to know, like spouses or, carers in the home or health care providers such health insurers? Here there is a call for shared confidentiality. Because I happen to interview one person⁹⁶ who is HIV/AIDS victim and the results of this interview resembles to many interviewee. The situation appears that persons living with HIV/AIDS are ready to have their health status disclosed to the health care provider provided that they are sure that their status should not be disclosed to the third party. Some of them happen to approach private health insurance companies and they were required to undergo compulsory HIV testing before entering into the health insurance contracts. It was not necessary as they were forced to disclose their health status which in away interferes with their right to privacy. Most of these interviewee seems to be unsure on whether the health insurance providers would handle their health status confidentially. To them that fear alone justifies their worries and becomes worried to disclose their health status to the insurers.

But the practice also reveals that if persons living with HIV/AIDS want to have their health taken care of why should he or she bother to hide that status? Now days it is no longer a big deal that someone is HIV/AIDS positive. Such compulsory requirement is mostly found in private firms that offers health insurance. If at all someone wishes to enter in those private arrangements is up to him or her to subject himself or herself to those requirements.

The interviewed respondents who appears to be insured by the National Health Insurance Fund over the practice of health insurance reveals that the process of joining the NHIF is usually effected by virtue of their employment through filing some forms from the NHIF. Through disclosing their salary slips, letters of employment, letter from his employer and the details of their dependants. There is no part which requires them to

⁹⁶ Anonymous source

disclose the status of their health of their dependants' health. So the health insurance is provided as a mandatory arrangement under such mandatory scheme by Government through their monthly contribution. Thus under NHIF or NSSF as mandatory schemes the insured normally join the schemes without any need of having their health tested. Thus it is not a problem to those persons who are living with HIV/AIDS to join these kinds of health insurance arrangements.

The researcher had an opportunity to interview some experts in insurance law. Practically the provision of health insurance in Tanzania is divided into two kinds as I have pointed herein above. There are those who are the beneficiaries of health insurance from National Health Insurance Fund which shows that there is no problem with those persons who are living with HIV/AIDS. However with private health insurance companies they happen to rely upon the doctrine of "*uberimae fidei*". The mandatory requirements from the private insurance companies that offers health insurance regarding disclosure of the health status of the applicants is due to their reliance in the provisions of the law that provides for some exceptions to general rule which allows privacy and confidentiality. For example section 15 (8) (b) of the HIV and AIDS (prevention and Control) Act which allows a medical practitioner to undertake HIV test of someone if he or she believes that such a test is clinically necessary or desirable in the interest of that person and on top of that section 17 (1) and 18 (b) of the same Act provides for shared confidentiality in the sense that health practitioner and insurance companies who may happen to be the custodian of any medical records, files or data or test results are supposed to observe confidentiality. Confidentiality should also be observed when handling necessary information that concerns the medical details, especially the identification and the status of persons living with HIV/AIDS. It will not be considered a breach of confidentiality in case medical practitioners who happened to deal directly with the patient or person decided to share information regarding such person. This practice is sometime misused by the health insurance providers and easily diverge the health status of the insured that is living with HIV/AIDS

The other practical aspect as a result of interview with some doctors is that, doctors can be obliged to disclose HIV status of someone under certain circumstances such as: if a court requested that information and in some cases if the people requested them to; or if one apply for certain types of insurance such as health or life insurance, and permit the insurer to access information from his or her medical records, doctors will be obliged to share that information, however, disclosure without the patient's knowledge is very rare, whenever possible patient or that person will be notified first. Thus HIV status may in some cases affect the application of that person. The patient's acknowledgement is still necessary before disclosure. Although the practice shows that the insurance companies or other employers once issued a medical form to be filled by the medical practitioner and the patient or applicant is required to fill in the said form, once the said person deliver that form to the doctor and volunteers to be tested then that amount to implied consent because the said form will be filled in correctly and delivered directly to the institution or insurer which asked for such information. The said insurer is presumed to handle such information confidentially.

5.3 Rights, Duties and Responsibilities of Health Insurers' Towards Persons Living with HIV/AIDS

Health insurers in Tanzania include both those falls under the mandatory public health insurance and individual (commercial) health insurance. Each type has its own arrangements in providing health insurance to people. However there are common rights, duties and responsibilities of the insurers. For instance, they can require some information which are material from the applicants for the sake of creating relationship between the health insurance providers and the insured, and that the information should be correct. On top of that they have the right of inquiring into those material facts for them to be able to make their decisions prior to the formulation of a contract. The health insurers have the duties and responsibilities towards the insured, which in a way comes from the fiduciary relationship as between the health insurers and the insured. From such a fiduciary duty each party must play its role honestly. So health insurer is duty

bound to disclose the extent of its coverage and to observe confidentiality in handling the insured information. On top of that the health insurers in doing so they are supposed to observe and make sure they are not in breach of other laws such laws which provides for the right of privacy and confidentiality.

5.4 Health Insurers' Experience

Just like when the researcher seeks to get the policy holders' experience as to their rights, at this point the researcher seeks to obtain the other side's experience as to the rights, duties and responsibilities of health insurers. At this point the basic question is if the health insurers have the right to inquire into the health status of the applicant which in a way has the impact of interfering with the applicant's right to privacy and especially to those who are living with HIV/AIDS. A researcher happens to interview some officials from the NHIF at Iringa. It is true that NHIF which is the mandatory public health insurance, they have no categories of who are HIV/AIDS positive and those who are negative. They offer health insurance to pensionable employees of the central and local Government. Besides they are now even offering health insurance to private persons provided they meet the required conditions. With private persons of course they need to know the health status of such person. With them the practice is for the employee through his or her employer to fill certain forms which have no relevance with the health status of the employee or the applicant. They normally deal with those diseases that the insured will need to be treated. You cannot deal with HIV/AIDS because the insured will attend a medical treatment in respect of the diseases he or she is sick like malaria, cholera etc. So this is why it is not mandatory to them to know the health status of the applicant especially in case of an employee who seeks to be insured by the NHIF as a compulsory health insurance scheme in the country.

When I asked about those private applicants who are not the employee of either central or local Government there was no direct answer but respondents kept on insisting that it was crucial to know the health status of such an applicant before entering into a contract. It seems they rely much on the information provided by the applicant.

A researcher had an opportunity of interviewing some officials from private health insurance companies on the practice of issuing health insurance to people especially those who are living with HIV/AIDS. The private health insurance companies practically issued health insurances to individual applicants or policy holders. Holders are entitled to health care services stipulated in the agreement with the health insurance companies. The very principles used in other insurances are applicable in health insurance. Thus the principle of *uberrimae fidei* is also applicable and in making sure the insurer is in a safe side they normally issued forms to the applicants to be filled by the medical doctor which will disclose the health status of the applicant. They normally have a direct link with medical doctors or laboratory which they recommend so that the results will be directly communicated to the insurers. Such information is so crucial to the insurers so that the insurers to be able to make an assessment of the risk to be insured. So there will be no chance of the applicant to withhold such information as to the status of his or her health. Such information will be hold as confidential by the insurers.

5.5 The Effect of HIV/AIDS Victims' Disclosure of Their Health Status

There are positive outcomes following disclosure of HIV/AIDS status. Positive outcomes now days include increased support, acceptance, and kindness⁹⁷. Disclosure was associated with less anxiety, fewer symptoms of depression, and increased social support, for example with a lot of NGOs which deals with HIV/AIDS issues provides a lot of support to victims. Disclosure caused the respondents to feel closer to their friends

⁹⁷ Anonymous source

and family members or others in their social network⁹⁸. There are also some negative outcomes. However, the above reported effects affected a very small percentage of respondents⁹⁹. These include desertion, aggression, anger, shame, and sadness¹⁰⁰. This study shows now days the issue of disclosure is not an issue. From the research it shows that with the coming of Antiretrovirals (ARVs) and education regarding HIV/AIDS, persons living with HIV/AIDS are not afraid of disclosing their health status. So it is now not an issue for a person living with HIV/AIDS to come forward and disclose his or health status to a medical practitioner provided the medical practitioner should not diverge such information to a third party without the consent of the victim.

The HIV/AIDS victim once discloses such status to a medical practitioner will be in a safe position to get proper medical attention. With private arrangements once a person living with HIV/AIDS decides to insure his or her life automatically such a person volunteers to subject himself or herself into those arrangements so that health care services will be offered to such person. Then once it is a voluntary arrangement such a person has the freedom of either remaining at home or approaching the health insurance provider so that his or her health be insured. What is to be insured is the health of that person why then should it be confidential and privacy issue as against the health insurer if at all the purpose is to insure the health of that person? Private arrangements are private in nature and a person is not forced unlike where NHIF had such kind of arrangements of prior testing before joining the scheme. If a person who is living with HIV/AIDS decides to take steps and comply with the insurers application forms which needs full disclosure of his or her health status it is that person who decides his or her own fate. Health insurer cannot be blamed that it interferes with the privacy of that applicant¹⁰¹.

⁹⁸ Anonymous source

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Ibid

5.6 Observations by TACAIDS

Tanzania Commission for AIDS (TACAIDS) is an Independent Department under the Prime Minister's Office, established by the parliament through Act No. 22 of 2001 and mandated as the overall National coordinator of the National Response to HIV and AIDS. TACAIDS provides strategic leadership and coordination of HIV and AIDS interventions in the country. The Commission is also responsible for resource mobilization for the national response through various fund-raising initiatives like the development of the Global Fund country proposals and negotiation with Development Partners through different approaches like pooled funding mechanism (NMSF). These funds are disbursed to implementers across the country. Monitoring and Evaluation is another key mandate of the commission. The National Multisectoral Monitoring and Evaluation System for HIV and AIDS provides information on progress towards set national targets and facilitates planning of future actions for appropriate response to the epidemic. Section 5 (1) (k) of the Tanzania Commission for Aids Act¹⁰² provides that one of the functions of the Commission is in collaboration with relevant sector protect human and communal rights of people infected with and affected by HIV/AIDS. The researcher had an opportunity of interviewing some officials from the commission.

The Commission's duties or functions, amongst others are, to promote access to treatment and care, protect the rights of the persons living with HIV/AIDS, to promote positive living of people with HIV/AIDS, to advise the government on all matters relating to HIV/AIDS prevention and control in Tanzania Mainland, etc. access to health care such as health insurance to persons living with HIV/AIDS is not a problem so far. As Commission HIV/AIDS victims are educated and promoted to live positively, meaning to accept the situation and move on. So motivation towards disclosure whenever necessary is always encouraged. So if the consent of the person living with HIV/AIDS is sought prior to testing and disclosure there will be no offence or breach of

¹⁰² Act No. 22 of 2001

the rights of that person. There is no offence if a person voluntarily gives his or her consent towards prior testing after asked to do so and gives his or her consent to the disclosure of such information to the third party. Unless done contrary to what the law provides. In a way in case a persons by reason of being HIV/AIDS positive is denied health insurance it will be an offence. I think the law should properly address the situation where someone is asked to test for HIV/AIDS prior to be offered health insurance and refused to do so. Because I think the health insurers especially those private sectors have their laws that guide them in entering into those contracts. Of which they are directed and protected by those laws such as insurance or contract laws. The prior consent of the person living with HIV/AIDS is the key point in this issue.

5.7 Conclusion

From the practical experience as shown herein above, it is clear that the health insurance regime does not offer sufficient protection to persons living with HIV/AIDS when applying for health insurance. Because health insurance providers while relying on the applicability of the laws allowing them to inquire into applicants' health status they in a way or impliedly trespassing into the privacy of those persons. The NHIF or compulsory social security schemes approach seems to be flexible taking into account the nature of schemes which have large number of contributors, unlike private health insurance arrangements. On the other hand it holds water that private health insurance providers should know the status of the applicant in order to be able to estimate the risk to be covered. It has been shown that one of the functions of the TACAIDS and the purpose of enactment of the HIV and AIDS (Prevention and Control) Act and its regulations is to protect the interest or rights of the persons living with HIV/AIDS. However, the absence of clear provisions in those laws, giving redress to persons living with HIV/AIDS against the health insurers' practices in offering health insurance renders the said persons' protection unattainable in this regard. The consequences of non-disclosure and misrepresentation of material facts as it is required by the principle of *uberrime*

fidei are severe. This renders the persons living with HIV/AIDS be at the mercy of the health insurers to continue compulsorily inquire into the health status of applicants. It is still uncertain as to the legal implications where the applicant refuses or unwilling to disclose his or her health status. Can the health insurance regime protect the rights of those who are unwilling to disclose?

CHAPTER SIX

SUMMARY OF FINDINGS, REFLECTIONS, GENERAL CONCLUSION AND RECOMMENDATIONS

6.0 Introduction

On the basis of the foregoing, it is crystal clear that the doctrine or principle of *uberrimae fidei* regulates the insurance business. Thus the conducts of the parties to the insurance contract are supposed to be in accordance with the principle of utmost good faith. It is equally true that in Tanzania we do have some laws that protects certain rights of certain groups of people such those who are HIV/AIDS patients. These people need to enter into contracts such as health insurance contracts which require parties to act in utmost good faith. In this chapter a summary of the main findings, this includes facts, laws and theories gathered by the researcher. This chapter will also assess and see the reflection of the research problem and hypotheses as against the findings. Finally, the general conclusion and recommendations will be supplied in this chapter basing on the result o outcome of the research.

6.1 Summary of Findings

In this research it is observed that in practice, health insurance providers are divided into those who fall under the mandatory public health insurance and those under private or individual health insurance. With mandatory health insurance like NHIF, the health status of an applicant is not necessary. Private or individual health insurance provided by private insurance companies are the ones who mostly requires disclosure of the applicant's health status prior to the formation of health insurance contract. The reason behind that requirement is that they need such information to be able to make assessment of the nature of contract they are about to enter in terms of risk to be covered.

The setup of the laws is said to be the main source of confusion and it gives the health insurance providers an opportunity to dictate what should be done when it comes to the rights of the persons living with HIV/AIDS. During the interview with the persons living with HIV/AIDS, it was reported by many of those interviewed that the main cause of their compulsory disclosure is the framing of the laws, that it looks like theoretically they have a right of privacy towards their health status and that HIV testing is a voluntary action however when it comes to practical aspects it is not. For example they even went far and talks of pre-employment conditions. Prior to employment the employee must compulsorily be tested HIV/AIDS which is strictly monitored by the employer. So a weaker party in health insurance contract is always the applicants because they should comply with the conditions set by the health insurance provider which requires compulsory disclosure.

The Insurance Act which is the principal legislation in insurance industry does not provide for sufficient protection to the proposers or policy holders who a living with HIV/AIDS when it comes to their rights against the private health insurance providers. The HIV and AIDS (Prevention and Control) Act¹⁰³ and the Constitution of the United Republic of Tanzania¹⁰⁴ or in other words the health insurance regime in Tanzania allows the rights of persons living with HIV/AIDS to be easily interfered with. They allow some exceptions to the rights of those persons living with HIV/AIDS. This research has further found that the said confusion or gap could also be filled by amending the Insurance Act and the HIV and AIDS (Prevention and Control) Act and its regulations to accommodate the protection of proposers or policy holders living with HIV/AIDS against health insurance providers. It is further noted that, absence of a clear provision of the law to the redress of policy holders living with HIV/AIDS who refused or withhold such information regarding their health status or the applicant who so refused but still wants to be covered against health insurance providers is a grave gap on

¹⁰³ Opcit

¹⁰⁴ Opcit

the part of insurance regime in Tanzania. Consequently the protections of policy holders who are HIV/AIDS patients become difficult.

Courts in East Africa have resorted to the strict application of English common law on the doctrine of *uberrimae fidei*. Thus the insured are hold responsible in case of breach of that principle. In that regard, the policy holders, especially those who are with HIV/AIDS, have to be handled with much care and not to be left at the mercy of the health insurance providers. This would require that the law be amended to provide redress to policy holders living with HIV/AIDS against health insurance providers.

6.2 Reflections on the statement of problem and hypothesis

The mere outlook of the setup of the insurance regime in Tanzania, it was expected that the interest of the policy holders in general as against the insurers are safe and well protected. Nevertheless, on the basis of the above findings and observations, it is obvious that there is absence of clear provisions of the law which clearly respect and protect the rights to privacy and confidentiality to persons living with HIV/AIDS. Thus the provisions requiring promotion and protection of interest of policy holders and those regarding the protection of the rights of the persons living with HIV/AIDS does not reflect the reality. Therefore, the assumptions that the health insurance legal regime in Tanzania does not explicitly respect and protect persons living with HIV/AIDS on their rights to confidentiality over their health status; the existence of conflicts of laws in the provision of health insurance in Tanzania and that the HIV and AIDS (Prevention and Control) Act does not provide for the exceptions as to confidentiality and duty to compulsory testing which covers persons living with HIV/AIDS when entering into health insurance contracts are affirmatively established.

6.3 General conclusion

The contract of insurance is governed, *inter alia*, by the doctrine or principle of *uberrimae fidei*. Parties to insurance contract are required to disclose all material facts. Failure to observe the doctrine's requirements entitles the innocent party to avoid the contract.¹⁰⁵

Despite this principle, this work has found that the interests of the policy holders especially those who are living with HIV/AIDS are exposed to abuse by the health insurance providers. The laws regulating health insurance regime in Tanzania does not provide clear protections to policy holders against health insurance providers. Thus the policy holder's protection is highly jeopardized.

6.4 General recommendations

The following are the general recommendations on how to make good the situation basing on the observed gaps and problems in the present law:

1. There should be a provision in the HIV and AIDS (Prevention and Control) Act which will address situations where persons living with HIV/AIDS who are not ready to undergo HIV/AIDS testing can still access health care services of their own arrangements even from those private providers. Without being compulsorily required to undergo HIV/AIDS testing. This would be the method of alleviating some of the uncollectible losses which applicants suffer at the hands of health insurance providers. I could not get an exact legislation from other jurisdictions that allow what I have recommended herein above however most of the jurisdictions seems to suggest such approaches basing on human rights point of view. This can easily be done just like what is happening with the compulsory health insurance (NHIF for example). The fact that having HIV/AIDS is not like saying someone is

¹⁰⁵ Carter v. Boehm *op. cit.* as seen in Chapter Two.

dying tomorrow and the reasoning by the NHIF for example that one cannot deal with HIV/AIDS as the disease but the treatment or cover will concentrate with the diseases associated with the situation of having affected with HIV/AIDS. So this amendment can be easily done in that regard.

2. The Insurance Act and the HIV and AIDS (Prevention and Control) Act should be amended to provide for clear provisions giving redress to the policy holders against health insurance providers when it comes to the violation of their rights towards privacy and confidentiality.
3. There should be a provision in the Insurance Act which will address the needs of special groups when it comes to certain categories of insurance which will reflect or suits the special cases or situations of a certain locality unlike copying the laws which suits the European culture. Here it means the special treatments to special groups which will be an exception to the principle of "*uberrimae fidei*".

"The applicants of health insurance especially in those private or individual arrangements should not be compulsorily required to undergo HIV/AIDS testing prior to the formation of the health insurance contracts just like the NHIF did".

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APPENDIX I: QUESTIONNAIRE TO RESPONDENTS

Introduction

I am Aden Adolf Kanje, a Master's degree student from Mzumbe University, Faculty of Law. I am researching on the topic "**the Principle of *Uberrimae Fidei* in Insurance Contracts: Analysis of Health Insurance Contracts and Their Legal Implications on Persons Living with HIV/AIDS in Tanzania**". This is a partial fulfillment of Master's Degree in Law (LLM) of Mzumbe University. This is the questionnaire which seeks to inquire into some details from you. The information you give will be kept in secret and only restricted to the writing dissertation the subject of this study. You have an option to write the name or leave it.

Section A.

Details of the Respondent

Name of the Institution/Organization (If any):

Completed by: (Name and Occupation)

Date:

Section B. Specific questions.

1. Are you aware of the persons living with HIV/AIDS?
 1. YES
 2. NO
2. Are you aware of the health insurance contracts in Tanzania?
 1. YES
 2. NO
3. Are you beneficiary of health insurance arrangements in your community?
 1. YES
 2. NO.

4. How do you handle those persons living with HIV/AIDS in your day to day activities? (please tick as appropriate)

- 1. In compliance with the law
- 2. According to the Organization standards
- 3. Mutual understandings

Section C. Specific questions.

The following questions relate to health insurance issues. Please answer/comment on the following questions.

S/N	QUESTION	ANSWER/COMMENT
1	Are you aware of the practice of offering health insurance in Tanzania? If Yes how is it?	
2	Is that practice discriminatory? If yes how discriminatory it is and the extent of the discrimination	
3	What are the rights and duties of persons living with HIV/AIDS in Tanzania in their day to day life as well when they need to have their health insured	
4	What are rights and duties of health insurers in their day to day activities and when dealing with person living with HIV/AIDS in Tanzania	
5	Are the laws responsible for protecting the rights of persons living with HIV/AIDS in Tanzania exhaustive enough in protecting the rights of those people? If No please what are your suggestions?	
6	Are you aware of the principle that parties to health insurance contracts must disclose all material information at the time of the formation of the contract? Please some details on your knowledge on this	
7	What are remedies in case the rights of persons living with HIV/AIDS are violated especially by the health	

	insurance provider	
8	Are you aware of the Authorities responsible in regulating, supervising or coordinating issue relating to health insurance and HIV/AIDS in Tanzania? If yes please what are they and their functions/duties	
9	Is the principle that requires full disclosure or utmost good faith in health insurance offensive to the rights of persons living with HIV/AIDS in Tanzania? If yes to what extent?	
10	How do you access healthcare services in your community?	
11	How effective is the healthcare services in your community?	
12	In case you find healthcare services in your community not satisfactory how do you do?	
13	Have you ever being in a situation where you want a health insurance but you were hindered due to some reasons beyond your control? What are they?	
14	What are your suggestions on anything you find as a weakness in the health insurance regime?	