**IN THE NON-BANK FINANCIAL INSTITUTIONS TRIBUNAL OF THE REPUBLIC OF BOTSWANA HELD AT GABORONE**

**CASE: NBFIT 0010-2023**

In the matter between:

**BOTSWANA INSURANCE COMPANY** **APPLICANT**

and

**NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY** **1ST RESPONDENT**
**RESEGOHETSE PHERESI** **2ND RESPONDENT**

**Coram:** M.M Baoleki Chairperson, D. Makati-Mpho Deputy Chairperson, and K.F Motlhanka Member

---

**JUDGMENT**

---

**Baoleki Chairperson: (Makati-Mpho and Motlhanka concurring):**

**Introduction**[1]

[1] The dispute between the Applicant (BIC[2]) and the 2nd Respondent (the Policyholder[3]) was referred to the 1st Respondent (NBFIRA) at the instance of the Policyholder.[4] The dispute emerges from the rejection of the Policyholder's insurance claim for the repair or replacement of his accident damaged vehicle. BIC rejected the claim on the basis that the Policyholder had violated a term of the contract, which required him to provide a breath specimen to a police officer for purposes of analysis of alcohol level.

---

[1] The writing of this judgment took a long time due to delays in the production of the transcribed record of proceedings. The Tribunal expresses its regret for any resultant delays this has caused.

[2] Botswana Insurance Company Limited: a company duly licenced and conducting general insurance business in terms of the Insurance Industry Act. While the Insurance Industry Act refers to the business as general insurance, in common parlance, a general insurer is referred to as a short-term insurer.

[3] For a definition of a policyholder, see section 2 of the Insurance Industry Act No 10 of 2015.

[4] For ease of reference, it is convenient to refer to the Applicant as BIC, to the 1st Respondent as NBFIRA and to the 2nd Respondent as the Policyholder.

[2] NBFIRA, sitting as the arbiter of the dispute, found in favour of the Policyholder. In view of that, BIC was directed to honour the rejected insurance claim in accordance with set timelines. The decision and reasons of NBFIRA are contained in a letter dated 12 June 2023, referenced CNBFIRA 9/1/1/10- IV (59). The decision of NBFIRA referred to above is contested by BIC. Placing reliance on section 52 of the Non- Bank Financial Institutions Regulatory Authority Act, 2016,[5] (hereafter, the Act), BIC has thus launched the present review application.

[3] Crucially, what BIC seeks is an order reviewing and setting aside the decision of NBFIRA which plainly directs it to make payment to the Policyholder for the rejected insurance claim. It must be highlighted upfront that the dispute herein centres on the proper interpretation and application of an exclusion clause in an insurance policy. Accordingly, this review turns on a crisp point, namely, whether or not NBFIRA was correct in finding BIC liable for payment of the repudiated insurance claim, bearing in mind the terms of the exclusion of liability clause contained in the insurance policy between BIC and the Policyholder.

**Source and Scope of the Tribunal's Jurisdiction**

[4] Before dealing with the merits of this matter, it is necessary to establish whether this matter engages the jurisdiction of this Tribunal. The jurisdiction of the Non-Bank Financial Institutions Tribunal (the Tribunal) is provided for under section 50 (1) of the Act.[6] In terms of section 51 read with section 52 of the Act,[7] every decision of NBFIRA made in terms of the relevant financial services law may be subject to a review by this Tribunal at the instance of an aggrieved party. The decision at the centre of this review application concerns the Act, and the

---

[5] While this Tribunal is alive to the fact that the Non-Bank Financial Institutions Regulatory Authority Act, 2016 has since been repealed and replaced by the Non-Bank Financial Institutions Regulatory Authority Act, No. 21 of 2023 which came into operation on 15 January 2024, for purpose of clarity, the applicable law is cited as at the date of hearing. This judgement will, however, capture in footnote, the equivalent and applicable provisions of the extant law.

[6] Now section 85 (1) of the NBFIRA Act, 2023.

[7] Now sections 86 read with 87 of the NBFIRA Act, 2023.

Insurance Industry Act, 2015. In terms of section 2 of the Act, the Act itself and the Insurance Industry Act are declared financial services laws. Therefore, it follows that this Tribunal has the requisite jurisdiction to review the decision of NBFIRA[8] as it was made pursuant to a body of financial services laws and affects the interests of BIC.

**The Factual Background**

[5] The material facts in respect of this matter are briefly the following. The Policyholder is an employee of First National Bank Botswana (FNBB). On 4 August 2022, the Policyholder took out a motor vehicle insurance policy to cover his newly purchased BMW 420i, registration number B 443 BRO (the insured vehicle). BIC issued the motor policy in respect of the insured vehicle, through the FNBB Insurance Brokers under Policy No. GA-FNB-50119425. The period of insurance was from 4 August 2022 to 3 August 2023 (period of insurance).

[6] For the purpose of this review, it is important to note that the policy in terms of which the vehicle was insured contained an exclusionary clause. This exclusion provided that where there was failure to provide a breath specimen to a police officer or any other recognised authority for purposes of analysis of alcohol level, BIC will not be liable for claims. The Tribunal will deal with this provision more fully later.

[7] During the period of insurance, the insured vehicle got involved in a car accident. In particular, on 17 September 2022 the insured vehicle collided with another motor vehicle bearing registration number B 765 BLY. The Policyholder was at the material time the driver of the insured vehicle. As a result of the car accident,

---

[8] *See* the judgment of the Court of Appeal in *Alpha Direct* (n 25 below), where the court held that policyholders have a right to raise issues relating to non-adherence to the terms of their insurance policies with NBFIRA as the regulatory and supervisory authority of all non-bank financial institutions in Botswana. Further, *Alpha Direct* held that "many clients of insurance companies do not have the means to engage lawyers for purposes of instituting court proceedings, and, as a public interest regulator, one of the functions of NBFIRA is to safeguard the interests of clients of non-bank financial institutions."

the Policyholder was in terms of the police report[9] charged for driving a motor vehicle without due care and attention contrary to section 51(1) of the Road Traffic Act,[10] while the driver for the other motor vehicle was not charged.[11] However, both drivers were subsequently charged under a different police report for failure to provide sufficient breath specimens for alcohol analysis contrary to section 47 (5) of the Road Traffic Act.[12]

[8] Relying on the insurance policy placed with BIC, on 19 September 2022, the Policyholder submitted an insurance claim to BIC for the repair or replacement of the damaged insured vehicle. BIC responded in terms of a letter dated 23 November 2022 (the repudiation letter) indicating that it has repudiated the Policyholder's insurance claim on the basis that the Policyholder had breached a material clause of the motor vehicle policy. Due to the importance of the repudiation letter, we reproduce the material terms hereunder:

> "From the police report, we note that the driver was charged with failure to provide sufficient breath specimen from alcohol analysis. As per the personal policy undertaken by yourself, kindly note:
>
> We will not be liable for: claims where there was failure to provide a breath specimen to a police officer or any other recognised authority for purposes of analysis of alcohol level.
>
> With reference to the above, we unfortunately are unable to assist and liability on the claim is denied.
>
> Our rights are reserved, including the right to rely on any other grounds for rejection of claim at any stage before or after institution of legal proceedings."

---

[9] See Police Report dated 22 September 2022 at p 103-104 of the bundle of record.

[10] CAP 69:01.

[11] n 9 above.

[12] See Police report dated 21 November 2022 at p 115-116 of the bundle of record.

[9] The Policyholder did not agree with the repudiation, and on 13 December 2022, in writing, he laid a complaint against BIC with NBFIRA. In his complaint letter, the Policyholder raised a number of allegations and accusations against BIC which we need not dwell on as they are inconsequential to the present review. However, in so far as is material, the relevant ground that the Policyholder placed reliance on is the ruling of the Gaborone Extension II Magistrate Court dated 26 April 2023.

[10] It is important to note that the ruling of the magistrate court referred to above, has acquitted and discharged the Policyholder on account of there being no case to answer with respect to the count of failure or refusal to provide breath specimen for analysis without reasonable excuse contrary to section 47 (5) of the Road Traffic Act. Furthermore, the magistrate court has held that the evidence tendered by the prosecution pointed out that the Policyholder failed to supply sufficient specimen for analysis while the charge sheet and particulars of offence suggested that he failed to supply the breath specimen.

[11] Determined to resolve the Policyholder's complaint, NBFIRA in an email communication of 5 May 2023 requested BIC to assist it in light of the ruling of the magistrate court. In our understanding, what NBFIRA did was to afford BIC the right to make submissions in defence of its position on the complaint lodged. It took not more than a week for BIC to make its submissions to NBFIRA. This was through a letter dated 12 May 2023. The main submissions may be summarised as follows.

[12] First, BIC is of the view that the judgement of the magistrate court has no bearing on the contractual breach by the Policyholder in terms of the policy wording in the sense that it does not negate the contractual breach effected by the Policyholder. Second, according to BIC, it is common cause that the Policyholder had failed to provide a breath specimen when the request was made by the police officer which is tantamount to a breach of contract and as such BIC is not entitled to honour the

claim. Third, regarding the validity of the insurance claim, BIC firmly stands by its position that the Policyholder's claim remains repudiated and denies any liability in its entirety.

[13] Following receipt of submissions by BIC, NBFIRA issued its decision. The decision is contained in a letter dated 12 June 2023. The relevant parts of the decision letter reads:

"NBFIRA has reviewed and analysed all the documentation regarding the matter and notes the following:

BIC repudiated the complainant's claim on the basis of breach of contract particularly clause 3.1 (1.2) of the policy document which states that BIC 'will not be liable for claims where there was failure to provide a breath specimen to a police officer or any other recognised authority for purposes of analysis of alcohol level'. This repudiation was supported by a police report dated 20 September 2022.

Mr. Pheresi was prosecuted at the Magistrate Court where he was accused of a single count of failure to provide breath specimen for analysis without reasonable excuse contrary to section 47(5) of the Road Traffic Act.

Through the Magistrate Court ruling delivered on the 26 April 2023, the complainant was acquitted for the offence of failure or refusal to supply breath specimen for analysis, it was further indicated that inadequate attention was paid to the charge sheet which was totally a different offence from the one raised.

Given that the Magistrate Court has ruled that Mr. Pheresi provided a breath specimen albeit insufficient, this subsequently means to NBFIRA that Mr. Pheresi did not fail to provide a specimen to the police officer for purposes of analysis of alcohol level and thus this does not constitute a breach of clause 3.1 (1.2) of the policy contract as alluded by BIC.

Based on the aforementioned, BIC is directed to honour Mr. Pheresi's claim on or before 16 June 2023.

Yours sincerely,

Matlakala V. Raphaka
Director-Regulatory Service (Insurance)"

[14] Quite plainly, the decision of NBFIRA is primarily based on the findings of the magistrate court. According to NBFIRA, the main reason for its decision was, and is, that the magistrate court has ruled that the Policyholder had in fact provided a breath specimen *albeit* insufficient. So, it is NBFIRA's position that the Policyholder did not fail to provide a specimen to the police officer for purposes of analysis of alcohol level as contended by BIC. Based on the foregoing, NBFIRA held that it could not be successfully contended by BIC that there was a breach of clause 3.1 (1.2) of the motor vehicle insurance policy in an instance where breath specimen was, as a matter of fact, provided.

[15] It is important to note that BIC is unreceptive to, and challenges the above findings and conclusion of NBFIRA. To demonstrate its unacceptance, BIC through a letter dated 16 June 2023 adamantly and boldly notified NBFIRA that it maintains its position with respect to its repudiation of the Policyholder's claim. The material terms of BIC letter which in the Tribunal's view are worth reproducing are the following:

"BIC maintains its position related to the complainant's claim to the extent that it is still of the considered view that the repudiation of the claim was well founded on the basis of a contractual breach by the complainant, particularly clause 3.1 (1.2) of the Policy document.

Furthermore that, the police report dated 20 September 2022 used in support of the repudiation clearly stipulated that Mr Pheresi (the Policyholder) had failed to provide a breath specimen.

The above notwithstanding, the repudiation was not based solely on the police report but primarily on the fact that there was no breath specimen provided by the complainant as required by the contract between the parties.

It is also worth highlighting that the repudiation is a civil matter assessed on a balance of probabilities while the burden of proof in a criminal matter is higher (beyond a reasonable doubt).

Further, the facts considered on either of the matters are unique to the issues in those matters and are to be considered on their respective merits. The claimant is, therefore, not entitled to payment solely on the basis of acquittal on the criminal matter while he (his claim) does not comply with the terms and conditions of the policy in place between him and BIC.

Based on the above assessment, please note that BIC humbly maintains the position as previously advised to the extent that the complainant's claim remains repudiated, and any liability thereto is denied in its entirety.

Please be advised that BIC intends to file a notice to review and an application to stay the regulator's directive in terms of section 12 of the Non-Bank Financial Institutions Regulatory Authority (Tribunal) Regulations."

[16] Given the above contestation over the decision of NBFIRA, BIC timeously filed its application for review before this Tribunal on 16 June 2023 contesting the legal correctness of the findings and conclusion of NBFIRA. BIC simultaneously filed an application to suspend the operation of the decision of NBFIRA pending the final determination of the review application.

[17] Neither NBFIRA nor the Policyholder opposed the BIC application to suspend the operation of the contested decision. Accordingly, on 26 June 2023, this Tribunal having considered the application at hand, granted the order prayed for by suspending the operation of the decision of NBFIRA pending the final determination of the substantive review application. This order is still in force.

**Submissions before the Tribunal**

[18] The parties' contentions on the application for review are set out in some detail in their papers. They were, further, elaborated upon in the parties' heads of argument and during oral arguments before us. The Tribunal proposes to deal with them seriatim.

*BIC's arguments*

[19] The primary contention of BIC as plainly stated in the review application is that, having regard to the proper interpretation of the clause/provision in question,[13] NBFIRA erred in its decision. Crucially, it is BIC's principal submission that the basis of the NBFIRA decision is incorrect by reason of an incorrect interpretation of the insurance policy wording and the parties' rights and obligations in relation thereto.

[20] According to BIC, NBFIRA was incorrect in finding it liable for payment of the insurance claim as it disregarded the first principle of legal interpretation that provides that where words are clear and unambiguous, those words should be given their ordinary grammatical meaning.

[21] In support of its argument, BIC relies on clause 3.1. (1.2) of the policy and submits that the clause in question presents no controversy. Accordingly, so the argument goes, if the wording of the clause is given its ordinary meaning (on the premises that the words are clear and unambiguous) it would be seen that it is beyond doubt that there was a failure on the part of the Policyholder to provide a breath specimen to the police officer or any other recognised authority for purposes of analysis of alcohol level.

[22] Clause 3.1 (1.2) which BIC places reliance on reads thus: "we will not be liable for claims where there was failure to provide a breath specimen to a police officer or any other recognised authority for purposes of analysis of alcohol level." Developing its argument on the basis of the quoted clause, BIC argues that since the clause is an exclusion of liability provision, it fundamentally excludes BIC's liability whenever a Policyholder fails to provide a breath specimen. BIC contends that the Policyholder under the circumstances failed to provide a breath specimen

[13] Clause 3.1 (1.2) of the Policy Document.

and as such BIC is released from its obligation to honour any claim arising out of the accident.

[23] In support of its argument in this regard, BIC contends that the purpose of an exclusion clause is to define, from the outset, the specific risks which will not be covered by the insurer in any event under the policy. As such, so the argument goes, clause 3.1 (1.2) of the policy explicitly and unequivocally excludes payment under any and all circumstances where a policyholder fails to provide a breath specimen for purposes of analysis of alcohol level.

[24] In addition, BIC takes issue with NBFIRA decision to the extent that it used the magistrate court ruling in relation to the criminal case against the Policyholder to further validate its directive which, in BIC's considered view, was relied upon incorrectly. If the Tribunal understands BIC correctly, the springboard of its argument is that NBFIRA should not have used the Policyholder's acquittal for the offence of failure or refusal to supply breath specimen as a basis for reaching its decision that the Policyholder had provided a breath specimen albeit insufficient. According to BIC, it was a misstep for NBFIRA to have proceeded from this angle as breach of contract and prosecution of criminal charges are two separate issues to be decided on their own merits. In sum, BIC submits that the NBFIRA decision is incorrect on the basis that it did not consider the literal meaning of the exclusion clause. Therefore, BIC prays that the decision should be reviewed and set aside.

[25] Turning to BIC's heads of argument, the main submissions therein may be conveniently summarised as follows:

25.1 BIC submits that this Tribunal does not sit as a court of law, and is therefore not bound by the traditional grounds of review as would apply

in a court of law[14]. In the premises, this Tribunal can review and set aside the decision in question on any ground as the Tribunal is not circumscribed by the traditional grounds of review, submits BIC;

25.2 to develop its point, BIC places reliance on the definition of "failure" as contained in the Oxford English Dictionary and argues that it is against such a definition that both the exclusion clause and the NBFIRA decision must be considered. The Oxford English dictionary which is relied upon defines the word "failure" to include an omission to do something, a lack of success and a person who, or thing, which turns out unsuccessful. Relying on this definition, BIC argues that it was entitled to avoid liability on two declarations of the exclusion clause; first, as there was a failure to provide a breath specimen, and second, for the purposes of analysis of alcohol level;

25.3 the question which then arises, so claims BIC, is whether the Policyholder provided a specimen of breath <u>for the purposes of analysis of alcohol level</u>, to which they submit he did not. BIC submits that it matters not whether there was a complete failure to provide a specimen of breath or whether the specimen of breath was insufficient. The fact remains that there was failure to provide a specimen of breath for the purpose of analysis of alcohol level, so claims BIC;

25.4 BIC further avers that the purpose for which the specimen of breath is required is for the analysis of the alcohol level in the person concerned. BIC therefore submits that it is against the above that "failure" must be viewed;

---

[14] The common law grounds for judicial review are the following: *ultra vires*/illegality, procedural impropriety and unreasonableness.

25.5 BIC also argues that naturally the complete failure to provide a specimen of breath would most certainly trigger exclusion under the said exclusion clause.[15] That having been said, so argues BIC, where an insufficient specimen of breath is provided, there is still a "failure" to provide a specimen of breath for the purpose intended, namely, the analysis of the alcohol level in the person concerned. Expressed differently, BIC argues that a breath specimen of the Policyholder that does not permit an analysis of the alcohol level to prove whether a Policyholder has passed the test or not, is in itself a failure to provide a specimen of breath for the purpose intended, namely, the analysis of the alcohol level in the person concerned. BIC concludes that on this ground alone, the decision of NBFIRA ought to be set aside;

25.6 according to BIC, there is yet another reason why the decision of NBFIRA is susceptible to be set aside. With reference to the magistrate court ruling in favour of the Policyholder, BIC observes that it is "trite and universally known that in criminal proceedings, the standard of proof is "proof beyond reasonable doubt". BIC further argues that neither NBFIRA nor this Tribunal are concerned with criminal proceedings, and as the standard of proof in civil proceedings is proof on a balance of probabilities, NBFIRA failed to apply its mind to the two standards of proof which are vastly different. BIC submits that NBFIRA relied solely and totally on the findings of the magistrate court. BIC further highlights that paragraph 3 of the decision letter evidences reliance by NBFIRA on the magistrate court ruling as it provides that "given that the magistrate ruled..... this subsequently is to NBFIRA that Mr Pheresi did not fail to provide a specimen to the police officer for the purposes of alcohol analysis..."

---

[15] Para 30 of BIC Heads of Argument.

25.7 BIC submits that had NBFIRA applied its mind to the question using the civil standard of proof, the only conclusion that it would have come to is that there was a failure to provide a specimen of breath for the purposes of analysis of alcohol level. BIC poses the following question: was an analysis of the alcohol level of the Policyholder possible? Its answer to the question is that, because the specimen of breath was insufficient to allow for the analysis of alcohol level, the answer is clearly "no". BIC concludes that, guided by civil standard of proof and the definition of failure as contemplated by the Oxford English Dictionary, there was breach of the exclusion clause which justified a repudiation. In the premises, BIC contends that the decision of NBFIRA is therefore both unreasonable and irrational in the circumstance, and stands to be set aside.

[26] It is important to note that in oral arguments, Ms Sono for BIC further reinforced BIC submissions and laid great stress on the definition of "failure" as contained in the Oxford English Dictionary. She submits that NBFIRA decision should be overturned because, in their view, consideration should be whether or not the Policyholder provided a breath specimen. She contends that, in accordance with the definition of "failure" as outlined in the dictionary, a failure amounts to a lack of success, which in this instance there was.[16] In an effort to fully understand the proposition put forward, the Tribunal directed Ms Sono to the police report, which is important in that it is the police who facilitated the taking of breath specimen. From it, Ms Sono was asked to provide clarity as to whether, putting aside the contestation over the sufficiency or otherwise of the sample, it could be held that the Policyholder did not provide a specimen. In her answer, Ms Sono urges upon this Tribunal that what is important is the intention of the exclusion that is contained in the contract of insurance. She submits that the intention there is to exclude all instances where there is no breath specimen for the purpose of alcohol analysis; and under these circumstances it should not matter whether it was

[16] Page 3 of the record of proceedings.

sufficient or not because at the end of the day there was no breath specimen for the purpose of analysing the amount of alcohol in the Policyholder's specimen.

*NBFIRA's arguments in reply*

[27] The counter arguments advanced on behalf of NBFIRA are essentially these. According to Ms Mpe the issues before this Tribunal are quite simple. In elaboration, Ms Mpe submits that the first issue is whether the Policyholder refused to provide a breath specimen, to which NBFIRA submits that it is not in dispute that the Policyholder provided a breath specimen. NBFIRA submits that what is in issue is whether the specimen was sufficient or was not sufficient. According to NBFIRA, when regard is had to the disputed clause which provides that "liability is excluded where the insured fails to provide a breath specimen", it is their submission that the policy is clear as it talks of failure to provide a breath specimen and does not include failure to provide a sufficient amount of breath specimen.

[28] It is NBFIRA's further submission that BIC's case is centred on offences created by the Road Traffic Act. In terms of the said Act, so submits NBFIRA, there are two distinct offences, being, failure to provide a breath specimen, and failure to provide sufficient specimen of breath when required to do so, without reasonable excuse. It is NBFIRA's submission that where the issue is failure to provide a sufficient breath specimen, which is the case with this matter, there are certain considerations that must be met before a finding can be made as to whether the breath was indeed insufficient. First, it must be proven that the person who administered the test was qualified to administer it. Secondly, that the instrument was in good working condition as at the time when the test was administered. Thirdly, that there should be proof that the instrument has been calibrated according to the required standards.

[29] It is NBFIRA's argument that BIC cannot on its own make an opinion of whether someone was driving under the influence of alcohol or not, as such is a scientific

opinion. Accordingly, NBFIRA submits that this matter cannot be disposed of by just simply saying "failure" means this and that according to the Oxford Dictionary, the scientific element must be addressed properly. Developing this argument, Ms Mpe submits that there is a machine involved, there is a test involved, there is a scientific opinion and all these can only be done by a third party. As the third party (police) failed on their case, then it follows that BIC must also fail, submits NBFIRA.

[30] Relatedly, and with more emphasis on the policy document itself, NBFIRA submits that the contract of insurance provides explicitly for failure to provide a breath specimen, and that it does not address provision of breath specimen which is reflected as insufficient by the machine. It is NBFIRA's contention that since the contract was drafted by BIC, it limited the exclusion to the failure to provide a specimen specifically. Therefore, so the argument runs, BIC cannot read anything else into the clause, neither can they be heard to say that they intended the clause to say this or that, because the other person was relying on the exact wording of the clause. Simply put, NBFIRA contends that the clause cannot be understood or interpreted on BIC's mere "say so".

[31] Building on this proposition, NBFIRA refers to the Policy Holder's Protection Rules and submits that the rules are very clear and dictate that an insurance policy must provide for concise details of any special terms and conditions including exclusions. So, in the present matter, the clause is, according to NBFIRA, very clear, and plainly refers to a failure to provide a specimen of breath, and deliberately refrains from including 'failure to provide sufficient breath specimen'. On that score, NBFIRA submits that the Policyholder provided the required specimen, albeit insufficiently. Related to the above submission, NBFIRA argues that the insufficient result as detected by the machine cannot directly be blamed on the Policyholder without first ascertaining that the officer who administered the test was qualified, that the machine was serviceable and properly calibrated and, also, that there was no reasonable excuse on the side of

the Policyholder. In sum, NBFIRA submits that the failure by the police officer to have gone through all these requirements cannot be interpreted against the Policyholder. It should rather be interpreted against BIC, submits NBFIRA.

[32] Building on Ms Mpe's submissions, Mr Modikana in a brief style lays emphasis on the submissions already made by Ms Mpe. He emphatically submits that BIC's entitlement to repudiate the Policyholder's claim was entirely dependent on the police report dated 20 September 2022, which charged the Policyholder with failure to provide sufficient breath specimen for alcohol analysis contrary to section 47(5) of the Road Traffic Act. He submits that, in light of the magistrate court ruling, there is no conclusive evidence that the 'insufficient result' was the fault of the Policyholder, and that it had not been proven that the police officer administering the test was competent to do so, nor that the breathalyser machine used was properly calibrated and serviceable.

[33] Mr Modikana further submits that, given that the magistrate court ruling quashed the charge from the police report that essentially meant to NBFIRA that BIC could not use the police report as proof to base its repudiation. Accordingly, he submits that BIC has failed to support its position that the Policyholder has failed to provide breath specimen in breach of his contractual obligations to BIC.

[34] Turning to NBFIRA heads of argument, the main submissions put forward may conveniently be summarised as follows.

[35] NBFIRA submits that the question for decision by this Tribunal is whether provision of insufficient breath specimen by the Policyholder is equivalent to a failure to provide a breath specimen, constituting a breach of clause 3.1 (1.2) of the policy document. According to NBFIRA, the answers to the above posed question is not far to come by. In particular, NBFIRA submits that section 48(1)

and (2) of the Road Traffic Act,[17] and the Policy Holder Protection Rules, 2019,[18] provide the answers.

[36] Crucially, NBFIRA relies squarely on clause 3.1 (1.2) of the policy and argues along the same line as BIC that the wording of the clause is clear and unambiguous. What is significant and to be noted is that while NBFIRA and BIC argue that the said clause 3.1 (1.2) permits a clear and unambiguous meaning, they are, nonetheless, at odds with respect to what they make of the clear and plain sense of the clause. On the one hand, NBFIRA submits that a person either provides or fails to provide breath specimen; and the intent of the clause is to ensure that a Policyholder must not refuse to be subjected to a breathalyser test when called upon to do so. NBFIRA further argues that, in determining whether a Policyholder has failed to provide a breath specimen, BIC relies on third party expert report or findings, viz, an order of court finding the claimant guilty of the offence, before they can conclude that the claimant has indeed failed to provide breath specimen.

[37] Amplifying its submission, NBFIRA submits that the difference between BIC's policy wording and the Road Traffic Act is that the latter envisages an instance where a person fails to provide a breath specimen or a sufficient breath specimen for there to be an offence under the said Act. The magistrate court dealing with the criminal matter against the Policyholder held that a failure to provide breath

---

[17] Section 48 (1): In any proceedings for an offence under section 46 or for an offence under section 50(3) in connection with a motor vehicle, the court shall, subject to subsections (2), (7) and (9), and having regard to any evidence which may be given of the proportion or quantity of alcohol or of any drug which was contained in the blood or breath of the accused, as the case may be, as ascertained by analysis of a specimen of blood or breath taken from him by a qualified person, at any material time:

Provided the specimen is not taken more than three hours following the offence.

(2) Where, in any proceedings for an offence under section 46 or for an offence under section 50(3) in connection with a motor vehicle, it is proved that the accused refused to consent to the taking of a specimen of blood or specimen of breath, for analysis by a qualified person, his refusal, unless reasonable cause thereof is shown, may be treated as supporting evidence given on behalf of the prosecution or as rebutting any evidence given on behalf of the defence.

[18] 3.1 Policyholder Contract Disclosures: "8. The following should be disclosed in a policyholder contract, where relevant:... i. concise detail of any special terms and conditions, exclusions, waiting periods, loadings, penalties, excesses, restrictions, or circumstances in which benefits will not be provided."

specimen and a failure to provide sufficient breath specimen are two distinct offences and that evidence pointing to the latter offence cannot be used to prove the charge specifying the offence of failure to provide breath specimen, submits NBFIRA.

[38] In the main, NBFIRA submits that a failure to provide a sufficient breath specimen is, therefore, not the same as a failure to provide a breath specimen. On that score, NBFIRA contends that BIC cannot seek to rely on evidence pointing to a failure to provide sufficient breath specimen to prove that there was a failure to provide breath specimen when the third party finding that they relied on, viewed the two as separate offences.

[39] Relatedly, NBFIRA submits that in the event that BIC seeks to broaden the reading of clause 3.1 (1.2) so as to include instances where there is a failure to provide sufficient breath specimen, BIC would have failed in its obligation to client as required in terms of the Policy Holder Protection Rules. The applicable rule, so argues NBFIRA, reads thus:

> "The following should be disclosed in a policyholder contract, where relevant: (i) concise detail of any special terms and conditions, exclusions, waiting periods, loadings, penalties, excesses, restrictions, or circumstances in which benefits will not be provided." (our emphasis)

[40] Anchoring its point on the above rule, NBFIRA submits that BIC has not concisely or clearly spelt out that the failure to provide a breath specimen includes a failure to provide a sufficient breath specimen and cannot, therefore, seek to enlarge the interpretation of the clause in the manner it suggests. According to NBFIRA, to interpret the clause in the manner suggested by BIC will bring ambiguity to it and leads to an absurd result. Placing reliance on the *contra proferentem* rule, NBFIRA argues that any clause considered ambiguous should be interpreted against the interests of the party who created or drafted it. This would mean that the clause should be interpreted in favour of the Policyholder, submits NBFIRA. In sum,

NBFIRA submits that it is not in dispute that the Policyholder provided a breath specimen, and on that account alone, BIC's contention that there has been a failure to provide a breath specimen should fail.

[41] NBFIRA further argues against BIC's submission that clause 3.1 (1.2) should not be interpreted restrictively. NBFIRA counters the suggestion by BIC that a much broader and purposive view must be taken to include instances where a Policyholder has failed to provide sufficient breath specimen. NBFIRA submits that in its literal interpretation, clause 3.1 (1.2) does not find the Policyholder to have been in breach since it is common cause that the Policyholder did take the breathalyser test and did provide a breath specimen.

[42] In elaboration, NBFIRA submits that if BIC's interpretation method is the one to be adopted in the present matter, then the burden of proof lies with BIC to prove that the Policyholder has failed, without reasonable excuse, to provide a sufficient breath specimen to the police officer for purposes of alcohol level. In order to discharge the onus, NBFIRA submits that BIC must prove the following: that the breath was taken by a qualified person, the devise used to test the Policyholder was in a serviceable condition and had been calibrated according to the manufacturer's standard such that the results it produced could be relied upon, and that there was a refusal to prove sufficient specimen without reasonable excuse.

[43] NBFIRA contends that it is common cause that the Policyholder was requested to take a breathalyser test by the police officer and that he complied and provided a breath specimen. What is in dispute, according to NBFIRA, is whether the test result of insufficient breath specimen was a result of the Policyholder's failure, or whether the police officer was qualified to do, or the serviceability of the machine. It is therefore, NBFIRA's submission that BIC has not made out a case for review of the NBFIRA decision directing it to honour the Policyholder's claim.

*BIC's submissions in rejoinder*

[44] In rejoinder, Ms Sono submits that consideration should not be whether or not the breath specimen is sufficient, but whether or not it was there for the purpose of analysing the alcohol content. To that end, she argues that the breath provided was not sufficient for the purpose of analysing the alcohol content in the Policyholder's system.[19] While Ms Sono submits that the basis for the repudiation is the lack of evidence or lack of breath specimen for the purposes of alcohol analysis, she was directed to page 116, third paragraph of the bundle of record (police report) which provides that "driver charged- failure to provide sufficient breath specimen for alcohol analysis". From it, she was asked to provide clarity as regards whether the police charge does not, contrary to her point of contention, confirm that breath was as a matter of fact provided, though insufficient. She conceded that "it does confirm that it was indeed provided, however insufficient for the purposes of alcohol analysis."[20] Furthermore, on clarity sought as to who determines the sufficiency or insufficiency of the specimen, Ms Sono's answer is that it is the police.[21]

[45] In an effort to counter the above concessions, Ms Sono laid great stress on the following submission. That consideration should primarily be on the interpretation of the contract. She argues that focus should be on the interpretation of the contract and the intent of the contract, and what the intention of the contract was; and the issue that is made from the facts, in relation to the contract, is whether or not there was a sample provided for the purpose of alcohol analysis, the latter being a really important consideration that cannot be ignored.

**The Issue**

[46] To understand the primary issue in this case, it is convenient, upfront, to note some uncontentious features or facts of this case as they bear on the clause in dispute.

---

[19] Page 5 of the record of proceedings.

[20] Page 7 of the record of proceedings.

[21] As above.

Insuring customers' motor vehicles is part of BIC business, and the Policyholder is one of the customers who placed his insurance cover with BIC. It is important to highlight that the existence and validity of the policy document is not in question, much as the payment of premium is not contested. It is further not in dispute that clause 3.1 (1.2) constitutes an exclusion of liability. What is also significant and important to note is that BIC and NBFIRA are in agreement that "naturally the complete failure to provide a specimen of breath would certainly trigger exclusion of liability under clause 3.1 (1.2)."[22] Simply put, BIC and NBFIRA are of the same mind that in terms of clause 3.1 (1.2), a policyholder who plainly refuses, and by consequence of his or her refusal, fails or omits to follow a command by police officer to provide a breath specimen for purposes of analysis of alcohol content breaches clause 3.1 (1.2) which entitles BIC to repudiate a claim arising out of the said failure.

[47] Relatedly, it bears highlighting the concessions made by Ms Sono on behalf of BIC to the effect that it is not disputed that the Policyholder provided a breath specimen when requested to do so by the police officer. However, while BIC does not dispute the occurrence of an insured event (the car accident) which would ordinarily entitle the Policyholder to recover the actual commercial value of the accident damaged vehicle,[23] it is contending that the Policyholder has nonetheless, despite the above concessions, breached clause 3.1 (1.2) in that his supply of a breath specimen which produced an "insufficient breath result" for all intents and purposes amounts to 'a failure to provide breath specimen to the police officer for purposes of alcohol analysis.' This contention gives rise to an issue that was debated at length before this Tribunal. The issue is this. Whether the result from

---

[22] Para 30 of BIC heads of argument.

[23] See *Nafte v Atlas Assurance Co Ltd* 1924 WLD 39 where it was held that a motor vehicle insurance policy entails an undertaking by the insurer to indemnify the Policyholder against loss or damage to a vehicle as described in the policy, in exchange for an agreed premium, payable either on monthly basis or annually. This is an indemnity insurance contract. The Policyholder is entitled to recover the actual commercial value of what he has lost through the occurrence of the insured event. The terms and conditions of a contract of insurance are embodied in a policy. The privileges and obligations of the parties should be set out in the policy in a clear way. This is an important document as it provides all the terms and conditions, rights and duties of the parties to the contract.

the breathalyser machine which indicated an insufficient breath specimen by the Policyholder unambiguously and plainly amounts to, a failure to provide a breath specimen to a police officer for purposes of alcohol analysis which is a material breach of clause 3.1 (1.2) entitling BIC to repudiate a claim. (our emphasis)

**Analysis**[24]

[48] Before we undertake the interpretative task of the primary issue set out above, there are other secondary submissions advanced by BIC, which merit consideration.

[49] The starting point is to consider the arguments made in respect of the nature and substance of the review powers of this Tribunal. To this, BIC submits that this Tribunal does not sit as a court of law, and is therefore not bound by the common law grounds of judicial review, being, illegality, procedural impropriety or unreasonableness. BIC lays emphasis on the contention that this Tribunal is able to review and set aside a decision of NBFIRA made in terms of any financial services law on any ground as the Tribunal is not circumscribed by the common law grounds of review.

[50] The answer to the above submissions is not far to come by. The Court of Appeal in *Alpha Direct*[25] has already confirmed that a review by this Tribunal has none of the limitations of the High Court review.[26] To borrow the words of Kirby JP,

---

[24] The Tribunal has read and considered all the documentation presented to it and has taken fully into account all submissions. This being the case, the Tribunal has chosen not to quote extensively from such material when delivering its judgement but instead to highlight the conclusions which it has drawn from that material and to set out the consequences for the parties.

[25] *Alpha Direct Insurance Company (Proprietary) Limited v Non-Financial Institutions Regulatory Authority and Others*, CACGB-139-18.

[26] Above n 25 at para 10 of the cyclostyled judgement. For a logical reference point and for comparative analysis purposes, see also *Tawana Land Board v Maher* [2020] 1 BLR 589 at page 600 where the Court of Appeal cited with approval the case of *Ker and Downey Botswana (Pty) Ltd v The Land Tribunal and Another* [2001] 2 BLR 47 at p 58.

parties [before this Tribunal] are entitled to a full review in terms of the Act.[27] This being a judgment of the highest court in the hierarchy of courts, the doctrine of precedent dictates that we should follow it. For that reason, BIC submissions are, in our view, meritorious. Accordingly, this Tribunal agrees with the decision in *Alpha Direct*.

[51] With the above position in mind, what this Tribunal may place emphasis on is that in order to avoid mischaracterising the statutory powers of the Tribunal, a distinction must always be drawn between the review powers of this Tribunal and the common law review of the High Court.[28] In many respects, regulation 27[29] reinforces and demonstrates the fact that there are no limitations on the manner in which this Tribunal is empowered to review a decision placed before it. First, it provides plainly that such a decision may, on hearing, be confirmed, amended, or revoked, in the discretion of the Tribunal.[30] Secondly, it gives this Tribunal the discretion, on hearing, to return the matter to NBFIRA or the self-regulatory organisation for reconsideration in accordance with any directions issued by the Tribunal.[31] Thirdly and crucially, this Tribunal may on hearing a matter make such orders as it deems appropriate.[32] We need not belabour this point.

[52] Consequently, it is evident that the common law grounds of judicial review, being, illegality, procedural impropriety and unreasonableness do not stand in the way of the Tribunal. Accordingly, it follows that in exercising its full review powers, this

---

[27] Above at para 43 of the cyclostyled judgement. While Kirby JP was concerned with the NBFIRA Act, 2007 which has since been repealed, it is important to note that the wording of the repealed Act in respect of the jurisdiction of the Tribunal is identical to the wording found in the NBFIRA Act, 2016 and has been transplanted word for word into the extant NBFIRA Act, 2023. Therefore, this judgment remains good law.

[28] Above.

[29] Non-Bank Financial Institutions Regulatory Authority (Tribunal) Regulations, No. 80 of 2018.

[30] Above n 29, reg 27 (a).

[31] Above n 29, reg 27 (b).

[32] Above n 29, reg 27 (c).

Tribunal is not only concerned with the procedure or the decision making process of NBFIRA.

[53] In the view we take of the matter, this full review can be decided on grounds that fall within a narrow compass and for a consideration of which a great deal of the material and arguments relating to the magistrate court's ruling need not be canvassed.[33] At the outset, let us clarify that this Tribunal makes no holding on whether the argument put forward by BIC that the ruling of the magistrate court is completely irrelevant for purposes of considering the validity or otherwise of the repudiation in question succeeds.[34] We do not find it necessary to make that holding because, even though BIC asserts the abovementioned, they rely on several other grounds and those grounds are dispositive of the matter. Plainly, our approach of this matter differs substantially from that adopted in the decision of NBFIRA. For clarity, our approach is fully in accord with BIC's proposition that this matter may solely be decided on consideration of the plain meaning and effect of the exclusion clause.[35] The explanation as to why we prefer to adopt a different line of reasoning will become apparent below. Upfront, it is convenient to say at once that we agree, with respect, with the decision made by NBFIRA, but we have reached that conclusion along a route differing from that followed by NBFIRA.

[54] We turn now to consider BIC's primary argument, that is, the proper construction to be placed on the exclusion and, in particular, the question whether a supply of a breath specimen which produced an "insufficient breath result" unambiguously

---

[33] However, our judgment does not and cannot question the magistrate court's discretion, and indeed power, to determine whether a *prima facie* case has been made at the closing of the prosecution's case in terms of the Criminal Procedure and Evidence Act.

[34] Suffice to say, it is vital to note that prosecution for the offence is not a condition precedent to recovery unless the policy expressly provides so. *See; London Guarantee Co v Fearnley* (1880) 5 App Cas 911, HL. From its wording the policy in question did not require BIC or the DPP to prosecute the Policyholder to prove the criminal charge nor does it require a court order, this in itself would defeat the very essence of insurance and its principle of subrogation. However, the requirement to prove breach of policy specifically to the standard recognised under the law is not dispensed with.

[35] The Tribunal is not authoring these grounds on equitable basis. They have being pleaded or made out by BIC in its papers.

and plainly amounts to 'a failure to provide breath specimen to the police officer for purposes of alcohol analysis' which entitles BIC to repudiate a claim on the basis that it is a material breach of clause 3.1 (1.2).[36] This question is important in that its determination will tell us whether or not NBFIRA was correct in finding BIC liable for payment of the repudiated insurance claim, consideration being had to the wording of the exclusion clause.

[55] While BIC and NBFIRA are not in disagreement that the grammatical and ordinary meaning of the language of the exclusion is clear and unambiguous, they, nevertheless, see the matter differently. On the one hand, BIC argues that clause 3.1 (1.2) explicitly and unequivocally excludes payment of a claim under any and all circumstances where the Policyholder has failed to provide a breath specimen for purposes of alcohol analysis. BIC places heavy reliance on the definition of 'failure' and argues that, since a failure includes an omission to do something, and a lack of success , the question that arises is whether the Policyholder provided a specimen of breath for the purposes of alcohol analysis. In that regard, BIC forcefully argues that since the breath provided did not enable the police officer to analyse the specimen for purposes of alcohol level, such is a clear case of a failure to provide a breath specimen as required by the exclusion clause. Put differently, according to BIC, clause 3.1 (1.2) captures all instances: be it a complete failure to provide a specimen of breath or a provision of breath specimen which turns out to be insufficient as to permit an analysis of alcohol content.

[56] Ms Mpe for NBFIRA counters by arguing that on a proper construction, the clear and plain words of the clause intently capture a failure or refusal to provide a breath specimen, but do not stretch to capture provision of a breath specimen which is reflected as an insufficient breath by the machine. She places some

---

[36] BIC argues with force that the plain and literal interpretation of clause 3.1 (1.2) lends the clause to this meaning. NBFIRA argues the contrary. Therefore, a question of construction arises where one side (BIC) submits that the particular provision in the policy covers the facts of the case and the other side (NBFIRA) submits that it does not.

emphasis on the Policy Holders Protection Rules[37] and argues that BIC cannot seek to stretch the meaning of clause 3.1 (1.2) for such will clearly violate the plain prescripts of the Policy Holder Protection Rules.

[57] Ms Mpe argues that rule 3.1 (8) (i) of the Policy Holder Protection Rules, in particular, provides in no uncertain terms that a policy must disclose to a policyholder, concise details of any special terms and conditions, exclusions, or circumstances in which a benefit will not be provided. On that score, she argues that the exclusion concisely provides the exclusionary terms or circumstances in which a benefit will not be provided, and the plain reading of the exclusion does not capture what BIC seeks to import into the exclusion. Therefore, according to NBFIRA, to merely accept BIC 'say so' on the meaning of the words used in the exclusion is impermissible.

[58] What do we make of these submissions?

[59] BIC argues with force that the plain and literal interpretation of clause 3.1 (1.2) lends the clause to the meaning that a result of 'insufficient specimen' is a "failure" to provide a specimen of breath for analysis of the alcohol level. NBFIRA argues the contrary. Therefore, a question of construction arises where one side (BIC) submits that clause 3.1 (1.2) in the policy covers the facts of the case and the other side (NBFIRA) submits that it does not. We turn now to the legal principles governing interpretation of insurance contracts.

**The law**

[60] There are two stages in determining the terms of a contract. The first is to establish the actual words and other conduct relied on, and the other is to interpret them. The normal rules relating to the interpretation of a document govern its interpretation.

---

[37] These Administrative Rules have been promulgated by NBFIRA in terms of the NBFIRA Act and the Insurance Industry Act and apply to all insurance entities including intermediaries licensed in Botswana.

[61] The interpretation of a contract of insurance is not a matter peculiar to insurance.[38] Therefore, the general rule is that an insurance contract has to be understood just like any other contract. It is to be construed in the first place from the terms used in it which terms are themselves to be understood in their primary, natural and popular sense.[39]

[62] When presented with a conflict between the parties as to the meaning of the policy (as is the case in the present matter), the Tribunal's function is to interpret what the parties have in fact said in their contract, not to speculate as to what they may have intended when entering into the contract.[40]

[63] What the parties have said is comprised in the words they have used; the problem is to ascertain what the words mean. In any document, the words used must *prima facie* be used in their plain, ordinary, popular rather than their strictly precise, etymological, philosophic or scientific meaning.[41]

[64] While the intention of the parties is paramount, in insurance, it is only the intention of the parties as declared by the words of the policy which may be taken into account. The task of the court is to reach the meaning of the parties' through the words used.[42]

---

[38] *Silverstone v North British & Mercantile Insurance Co* 1907 ORS 73.

[39] *Curtis & Harvey v North British* [1921] AC 303. *Young v Sun Alliance & London Insurance* [1977] 1 WLR 104.

[40] *Re: George and Goldsmith and General Burglary Insurance Association* Ltd [1899] 1 QB 595 at 609 per Collins LJ; Halsbury's Laws of England Vol 25 para 395.

[41] Stanley v Western Insurance Co. (1886) LR3 Exch 71.

[42] *Thames & Mersey Marine v Hamilton* (1887) 12 AC 484, 490.

[65] Coming home, Lord Sutherland JA, in *Mascom Wireless Botswana*,[43] held that language should be given its ordinary grammatical meaning, and if the result is clear and unambiguous it will be assumed that it accurately reflects the intentions of the parties.

[66] Relatedly, in the *Sinohydro Botswana*,[44] Lesetedi J (as he then was) quoting with approval the dictum of Smalberger JA, in *Fedgen Insurance Ltd v Leyds*[45] expressed the legal approach to interpretation of an insurance policy thus:

> 'The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (*Scottish Union & National Insurance Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464-5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (*Auto Protection Insurance CO Ltd v Hanmer-Strudwick* 1964 (1) SA 349 (A) at 354C-D); for it is the insurer's duty to make clear what particular risks it wishes to exclude (*French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd* 1931 AD 60 at 65: *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* (supra at 354D-E). A policy normally evidences the contract and an insured's obligation, and the extent to which the insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the contra proferentem rule, which requires the written document to be construed against the person who drew it up, would operate against [the insurer] as the drafter of the policy (*Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (A) at 108C).

[67] Applying these rules of construction, the first step is to ascertain if there is an apparently clear and unambiguous meaning to be attached to the wording of clause 3.1 (1.2). Looking at the language alone, without taking any other consideration into account, the most obvious and grammatical construction must be the one

---

[43] *Mascom Wireless Botswana (Pty) Ltd v Linda's Holdings (Pty) Ltd t/a Fones 4u* 2004 (2) BLR 65 (CA).

[44] *Sinohydro Botswana (Pty) Ltd v Botswana Insurance Company Ltd* 2012 (1) BLR 527 (HC.

[45] 1995 (3) SA 33 (A) at p 38B-E.

commonly agreed to by BIC and NBFIRA. This appears to us to be the only way in which proper context can be given to the words 'failure to give specimen when requested by a police officer for purposes of alcohol analysis.' The phrase 'when requested to do so by a police officer for purposes of alcohol analysis' inevitably implies that the Policyholder must comply with the command to provide a breath specimen and if he fails to comply with the command, he will be in breach of the policy and the insurer will be entitled to repudiate. The phrase 'a person does not provide a specimen of breath for analysis unless the specimen is sufficient to enable the test or analysis to be carried out' has an entirely different meaning, but it is the meaning which BIC seeks, in our view wrongly, to ascribe to clause 3.1 (1.2).

[68] Reverting to the principle established in *Sinohydro Botswana*[46], any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted; for it is the insurer's duty to make clear what particular risks it wishes to exclude.[47] The reason given is that, because the insurer usually drafts the policy which contains its promise to the Policyholder as well as any limitations on that promise, it is its duty to make clear and spell out plainly the limitations it wishes to impose and the risks it wishes to exclude.[48] However, if a term restricting an insurer's liability is expressed in clear language, it receives its full effect.[49]

[69] Looking once more at the contractual clause, can it be said that this clause clearly, plainly and totally conveyed to the Policyholder that where the test is administered but the results indicates 'insufficient breath', his claim will be rejected? We think

---

[46] n 43 above.

[47] The legal position in respect of exclusion clauses is clear. A penalty clause is interpreted strictly. (*Lange & Co v SA Fire & Life Assurance Co* (1867) 5 Searle 358 365).The same treatment is meted out to a clause which limits or excludes an insurer's obligation to render performance to the Policyholder and which is expressed in vague or ambiguous language. (*Botha's Trucking v Global Insurance Co Ltd* 1999 3 SA 378 (T) 378 I).

[48] *Barnard v Protea Assurance Co Ltd t/a Protea Assurance* 1998 3 SA 1063 (C) 1068 B-D.

[49] *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* 1964 1 SA 349 (A) 354.

not. While it undoubtedly expresses that BIC will not be liable for a claim where there is failure to provide breath specimen when asked to do so by the police officer, it deliberately or directly refrains from actually stating in clear and plain terms that a claim will be repudiated even in an instance where breath is provided but the results are 'insufficient breath' as ["failure" includes refusal, failure to provide breath specimen and providing insufficient breath specimen]. On the contrary, it states in clear terms that where a policyholder 'fails to provide a breath specimen when requested to do so by the police officer for alcohol analysis'. Certainly the test, according to the plain wording of the exclusion clause, is that where a request is made to provide a breath specimen and there is failure on the part of the policyholder to do so, such conduct gives BIC, the entitlement to outrightly reject any claim flowing from the conduct. To read into the exact policy wording that even where there is no refusal or failure to proceed to provide a breath specimen to a police officer, and breath is provided but does not tell whether the Policyholder is within or beyond the permitted alcohol level, such still amounts to a breach of the clause, will be to overstretch the plain language of the clause.

[70] Accordingly, the Tribunal holds that language is not used unnecessarily. And if too little is said, problems arise. Every word of a contract must be given a meaning. Just as the presence of every word or phrase in the contract is relevant to its interpretation, so too may be the absence of certain words, phrases or provisions from the contract be relevant in its interpretation and in ascertaining what the parties intended those words, phrases or provisions that do appear in it, to mean.[50] Although in a different context, Mokgoro J, in *Veldam v DPP (*WLD)[51] provided an example of what a strained reading of a constitutional provision would be. Clause 3.1 (1.2) of the policy document in its current form, for these reasons, does not provide BIC with the right to repudiate an insurance claim where the Policyholder has complied with the request by a police officer and provided breath

---

[50] *Concord Insurance Co Ltd v Oelofsen* 1992 4 SA 669 (A).

[51] *Veldam v DPP (*WLD) 2007 3 SA 210 (CC). It was held that "to read 'prescribed punishment' in section 35 (3) of the Constitution as inclusive of penal jurisdiction under section 92(1)(a) is to give it an unduly strained meaning.

specimen though such a breath specimen yields an insufficient result. This is so in view of the absence of clear wording to that effect, and also on account of the restrictive or strict rule used to interpret the wording in clause 3.1 (1.2).

[71] Perhaps more pertinent to the matter at hand, is the central duty of BIC to provide concise details of exclusions of liability, or restrictions or circumstances in which benefits will not be provided. In what effectively amounted to "a reinstatement of the common law", rule 3.1 (8) (i) of the Policy Holder Protection Rules provides that:

"The following should be disclosed in a policyholder contract, where relevant: (i) concise detail of any special terms and conditions, exclusions, waiting periods, loadings, penalties, excesses, restrictions, or circumstances in which benefits will not be provided."

[72] Plainly, the argument by BIC does not account for the express requirement of rule 3.1 (8) (i) of the Policy Holders Protection Rules as well as the restrictive interpretation rule governing exclusion of liability clauses. Thus, in our view, Ms Sono cannot use her argument so as to change the character or ambit of the extant exclusion clause. If that meaning (as put forward by BIC) had been intended, the draftsman would surely have said so in clear and plain terms.[52] As Ms Mpe correctly submits, to rely on BIC's mere 'say so' will plainly run counter to its duty to provide concise details of exclusions of liability, or restrictions or circumstances in which benefits will not be provided.

[73] In short, in our view, BIC and NBFIRA submit quite correctly, that the grammatical and ordinary meaning of the language of the exclusion is clear and unambiguous. It is evident therefrom (as agreed to by BIC and NBFIRA) that, a policyholder who plainly fails to heed to the police officer's command to submit

---

[52] Maasdorp AJA in *Van Resburg v Straughan* 1914 AD 317 at p 328 underscored the same point as follows: 'where, therefore, the only question before the court is with respect to the rights of the parties under their contract, the terms of the contract must be strictly enforced.'

himself to the test and does not provide a breath specimen, violates clause 3.1 (1.2) which, in turn, entitles BIC to repudiate a claim based on the said commission or omission.

[74] We now turn to the second layer of BIC's argument which is crucial for the fate of this review. The question that calls for an answer is this: whether the clear and plain language of,[53] or alternatively, whether the purposive interpretation of clause 3.1 (1.2) is capable of being read to say that there is still a 'failure' to provide a breath specimen for purposes of alcohol analysis, where breath provided caused the machine to point out an 'insufficient breath result'.

[75] The point raised by BIC in respect of the above appears at first blush to have merit in that provision of 'a specimen of breath for analysis of alcohol content' must necessarily mean a specimen of the type necessary to allow the measurement to be done. This would, so the argument runs, imply that the sample of breath provided must be such that the true alcohol level can be ascertained by a device used for testing. Thus, BIC is urging upon this Tribunal to read clause 3.1 (1.2) to mean the following, that: 'a person does not provide a specimen of breath for analysis unless the specimen (a) is sufficient to enable the test or analysis to be carried out, and (b) is provided in such a way as to enable the objective of the test or analysis to be satisfactorily achieved.'[54]

[76] On a closer examination, however, this point cannot succeed. This is so because the approach to the interpretation of a contract of insurance, in general, and exemption or exclusionary clauses in particular, has by now become well settled. It may be summarised by the statement of two basic principles. First, a contract

---

[53] BIC argues with force that it does.

[54] This provision is borrowed by the Tribunal from section 11(3) of the English Road Traffic Act, 1988. It was put in the English legislation, no doubt, for the avoidance of doubt. Importantly, had BIC couched its exclusion clause along these lines, it would be beyond question that refusal, failure to provide or provision of insufficient breath specimen are expressly captured by the exclusion.

of insurance must be construed like any other contract so as to give effect to the intention of the parties as expressed in the policy. Thus the terms are to be understood in their plain, ordinary sense unless it is evident from the context that the parties intended them to have a different meaning.[55] Second, and crucially, whilst the ordinary rule is that the insured must prove itself to fall within the primary risk insured against by the policy, an exception clause is restrictively interpreted against the insurer, because it purports to limit what would otherwise be a clear obligation to indemnify.[56]

[77] In this regard, it is beyond question that there is no room for a more reasonable interpretation than the plain meaning of the words themselves convey, particularly so if there is no ambiguity. For clarity, here is how *Norwich Union Fire Insurance Society Ltd*[57] eloquently explained it "no rule, in the interpretation of a policy, is more firmly established, or more imperative and controlling, than that, in all cases, it must be liberally construed in favour of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which, in making the insurance, it was his object to secure."[58]

[78] Equally significant, the approach or interpretation which BIC urges upon us is not without difficulties. First, does it mean in all instances where a breath specimen provided does not produce a negative or positive result, the insurer is entitled to repudiate? Second, does it mean where the policyholder complies with the request by the police officer to provide a breath specimen but the sample provided cannot be used to tell if he is within or over the prescribed limit, the exclusionary clause should be used against him regardless of whether or not results were not obtained

---

[55] *Blackshaws Ltd v Constantia Insurance Ltd* 1983 (1) SA 120. Also see *Fedgen Insurance v Leyds* 1995 (3) SA 33 (A) at 38A-E which is authority for the proposition that a policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out.

[56] *Van Zyl v Kiln Non-Marine Syndicate Number 510 of Lloyds of London 2003* (2) SA 440 (SCA) at 446A-H.

[57] *Norwich Union Fire Insurance Society Ltd v SA Toilet Requisite Co Ltd* 1924 AD 212; quoting *May on Insurance* (secs. 174-175), in particular the opening words of sec.175 in the 4th ed.

[58] Above.

as a result of the incompetence of the person administering the test, or whether or not the machine was serviceable? Third, does it only mean that where a policyholder refuses of fails to provide a breath specimen against the orders of the police officer for alcohol analysis, such is the only instance where the insurer is entitled to repudiate? The approach leaves a lot of room for subjective leeway for the insurer to tailor the meaning to suit a given situation which runs counter to rule 3.1 (8) (i) of the Policy Holders Protection Rules and further conflicts with the restrictive or narrow interpretation rule attributed to exclusion of liability clauses. It is important to note that the meaning and application of an exclusion clause ought to be independently ascertainable without depending on the exigencies of either party.

[79] Based on this clear legal position, BIC was, and is enjoined to set out the privileges and obligations of the parties in a clear way. In the premises, an exclusion clause must therefore contain a clear and concise statement of the material facts upon which the insurer will rely upon for the repudiation, with sufficient particularity to enable the policyholder to know what is excluded. Generally, an exclusionary clause is not to be interpreted widely to extinguish existing rights and obligations. This is so unless the clause itself provides otherwise or its language clearly shows such a meaning. Accordingly, the Tribunal holds that, exclusionary clauses are intended to give fair warning of their effect to policyholders and permit insurers to rely on their meaning. However, in order that the insurer may squarely rely on an exclusionary clause, its meaning and effect must be certain, clear and stable.

[80] Quite plainly, the purpose of the exclusion clause in its current form or shape does not permit this Tribunal to read into it the meaning contended by Ms Sono. In our view, the grammatical and ordinary meaning of the language of the exclusion is clear and unambiguous, and does not present any grammatical ambiguity or semantic obscurity. As the meaning of the words is clear and no ambiguity arises then the intention must be found in these words.

[81] It bears underscoring that the line of case law above is illustrative of the restrictive interpretation rule ascribed to exclusionary clauses which stands on the way of the purposive interpretation argument. Therefore, to hold that clause 3.1 (1.2) purposively affords a valid basis to enable this Tribunal to set aside the decision of NBFIRA would subverts the very purpose sought to be achieved by the restrictive interpretative rule. It would also be in contravention of the Policy Holders Protection Rules. For that reason the interpretation of the clause is confined to what the parties expressed in their words, not what they may have intended to say.[59] If indeed BIC had intended this, it would, as a respectable insurer, and as dictated by the Policy Holders Protection Rules, have expressed it in clear and direct words.

[82] In so holding, we are not saying BIC is not entitled to limit its liability in the way it is proposing.[60] What we are simply saying is that considering the clause in dispute and the policy as a whole, and the fact matrix, such a meaning is not clear and unambiguous as Ms Sono submits. What is rather obvious (to which Ms Sono also admits to) is that a policyholder who when requested by a police officer or any lawfully authorised officer to supply or provide the breath sample, flatly refuses or omits to follow such a command, commits a breach of the insurance contract which entitles BIC as the insurer to repudiate a claim placed in its hands. In sum, the body of authorities to the effect that an exclusion clause must be

---

[59] The potential conduct of a policyholder to escape capture of the exclusion clause by submitting himself or herself to the authority of a police officer and then proceed to provide a breath specimen that yields an insufficient result itself should have served or should serve as an indicator that BIC should have tightened the terms of its exclusion clauses. It may be that from the perspective of BIC and in view of the facts of this case, that the conclusion of the Tribunal is too lenient and for that reason unfair or unbusiness-like for the general insurance business. However, the rules governing the interpretation of exclusion clauses applies to all exclusions, notwithstanding the perceived heinous or artful nature of the Policyholder. Therefore, an exception clause is restrictively interpreted against the insurer, because it purports to limited what would otherwise be a clear obligation to indemnify.

[60] For the sake of clarity, this should not be understood to imply that insurers do not have a right to impose restrictive or exclusion clauses in their policies, or that a policyholder has a vested right to quibble with such clauses. What we are saying is that a policyholder does have a legal valid interest in the certainty that the meaning and effect of an exclusion clause as at the time of the placement of the cover will not exceed its plain meaning when it is now applied as at the time the claim is lodged.

afforded a restrictive interpretation prevents us from finding merit on the purposive interpretation points developed and strongly argued by BIC.

[83] To put what we are saying in the preceding paragraph beyond question, the wording of the exclusion clause is not clear in respect of what BIC seeks from it,[61] therefore, it invites a strict or narrow interpretation and that offers less protection to BIC.[62] In this connection, the Tribunal sees no basis for reading the reference in clause 3.1 (1.2) to "failure to provide breath specimen when requested by a police officer for purposes of alcohol analysis" to mean, if a policyholder complies with the direction of the police officer and provide a breath specimen but the result is insufficient, under no circumstances will it bind the insurer to honour the claim.

[84] Before we conclude our judgment, regardless of the risk of being repetitive, we need to have a look at Ms Sono's argument raised in her rejoinder for the sake of completeness. The argument by Ms Sono is this. That this Tribunal must consider the intention of the contract, and what the intention of the contract was leads to the inquiry of whether there was a sample provided for the purposes of alcohol analysis. Ms Sono submits that, by this reasoning, it leads to an interpretation that the Policyholder did not provide the breath sample for alcohol analysis.

[85] Straight away, the Tribunal is hesitant to adapt the interpretation that Ms Sono urges it to follow. The reasons for our hesitation are simply these. First, the argument by BIC does not account for the express requirement of rule 3.1 (8) (i) of the Policy Holders Protection Rules. Second, the argument by BIC ignores the restrictive interpretation rule governing exclusion of liability clauses which in essence protects the Policyholder's legal valid interest in the certainty that the meaning and effect of an exclusion clause as at the time of the placement of the

---

[61] It is only clear in respect of what BIC and NBFIRA commonly agree upon.

[62] *Allianz Insurance Ltd v RHI Refractories Africa (Pty) Ltd* 2008(3) SA 425 (SCA) at 428, paragraph 7 said: "...an exception clause is restrictively interpreted against the insurer, because it purports to limit what would otherwise be a clear obligation to indemnify."

cover will not exceed its plain meaning when it is now applied as at the time the claim is lodged.[63] Third, and crucially, we are being urged to first seek to divine the 'intention' of the parties and then adapt the language of the provision to justify that conclusion. Wilson CJ, long identified the illegitimacy of this approach in *Richard v Austin*[64] where he said:

'... as to the argument for the assumed intention of the legislature, there is nothing more dangerous and fallacious in interpreting a statute than first of all to assume that the legislature has a particular intention, and then, having made up one's mind what that intention was, to conclude that the intention must necessarily be expressed in a statute, and then proceed to find it.'

[86] While the above statement was made with reference to statutory interpretation, it applies with equal force to contractual interpretation. No doubt all exclusion clauses are to be construed strictly, that is to say, the Tribunal must see that the thing excluded is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, or the thing is so clearly within the mischief that it must have been intended to be included, and would have been included if thought of. Simply put, this Tribunal will not supply a drafting omission to the clause in dispute, for doing so is the preserve of contract draftsmen, and not an adjudicative function. Consequently, Ms Sono's submission is rejected.

[87] As *Capital Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd and Others*[65] tells us:

---

[63] *Norwich Union Fire Insurance Society Ltd v SA Toilet Requisite Co Ltd* 1924 AD 212 quoting May on Insurance tells us: "No rule, in the interpretation of a policy, is more firmly established, or more imperative and controlling, than that, in all cases, it must be liberally construed in favour of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted."

[64] *Richard v Austin* (1911) 12 CLR 463 at 470.

[65] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* (470/2020) [2021] ZASCA 99 (09 July 2021).

"Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."

If all of this is appreciated, then it readily becomes clear why the contentions advanced on behalf of BIC cannot be sustained.

[88] In all the circumstances therefore and having regard to the language of the policy, the context and the strict interpretation rules governing exclusion clauses, the sensible meaning to be ascribed to it that is legally tenable (taking heed of prescripts of the Policy Holders Protection Rules) is the one for which NBFIRA contends.

[89] For the reasons that appear above, we are not persuaded that the end result of the decision of NBFIRA was wrong.[66] As such, the NBFIRA directive or decision is confirmed but for different reasons. The consequence is that the review must fail.[67] Accordingly, BIC is hereby ordered to honour the Policyholder's claim within 30 days from the date of this judgement.

[90] Insofar as the question of costs is concerned, there is, in our view, no need to saddle any of the parties with costs.

---

[66] NBFIRA granted the correct order/directive, albeit for different reasons. Put differently, while the decision of NBFIRA was based on different reasons, it nonetheless granted the correct order/directive.

[67] It is not in dispute that the onus is upon the insurer to prove that the insured has breached the terms of the insurance policy. (*See Eagle Star Insurance CO Ltd v Willey* 1956 (1) SA 330 (A) at p 336C-D). It is true that BIC had little doubt that both drivers were taken in for breathalyser testing, but proof of that failure to provide breath specimen for purposes of alcohol testing was or is another matter. The insurer in this case had the primary burden of proof. It has not proved the application of the exclusion. The Tribunal finds that BIC as the Applicant has failed to establish its case for the review and setting aside of the decision of NBFIRA. It is so that evidence does become relevant during the clause 3.1 (1.2) analysis. However, in this matter, that evidence related to allegations contained in a police report and it is clear that such evidence didn't lend support to the interpretation motivated by BIC, and equally so, such evidence was not subjected to the requisite test (proof on a balance of probabilities) in BIC calling the police officer as its witness before this Tribunal.

[91] The parties are advised that any person who is dissatisfied with the decision of this Tribunal may, within 28 days of delivery of this decision, appeal to the High Court.

**DELIVERED IN OPEN TRIBUNAL AT GABORONE ON THIS 23 MAY 2024.**

NON-BANK FINANCIAL INSTITUTIONS TRIBUNAL
MVA HOUSE, FAIRGROUNDS OFFICE PARK
23 MAY 2024
PRIVATE BAG RWK 11 GABORONE
TEL: +267 392 4246
REPUBLIC OF BOTSWANA

**MM Baoleki**
**Chairperson of the Tribunal**

**D Makati-Mpho**
**Deputy Chairperson of the Tribunal**

**KF Motlhanka**
**Member of the Tribunal**

APPEARANCES

| | |
|---|---|
| For the Applicant (BIC): | T Sono and L. Takobana. |
| For the 1st Respondent (NBFIRA): | A. Mpe, T. Modikana and K. Kealotswe. |
| For the 2nd Respondent (Policyholder): | No appearance. |