HH 14/2004
HC 5947/02

WEDZERA PETROLEUM (PVT) LTD
Versus
ZIMNAT LIFE ASSURANCE COMPANY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 7 and 8 May 2003 and 28 January 2004

APPLICATION FOR ABSOLUTION FORM THE INSTANCE

Mr *Mutero*, for the plaintiff
Mr *De Bourbon,* for the defendant

KAMOCHA J: At the beginning of July 2001 the defendant "Zimnat" through its agent introduced to plaintiff - "Wedzera" its new investment policy called Cash Pal. On 4 July 2001 Wedzera made a proposal to Zimnat under cash pal for two policies.

The proposal was accepted by Zimnat which then issued the two formal policies to Wedzera. This trial is centred on those two policies.

The relevant provisions of the policy documents for the purposes of these proceedings are these.

The premiums payable were $500 000,00 per month per policy running from 1 July 2001 to 1 July 2001.

The guaranteed maturity value of the policies was $487 195 971,00 on each policy. The guaranteed maturity value assumed that all escalation options were exercised at the elected rate of 20% per annum.

The general privileges and conditions provided in clause 12 that the policies could be wholly or partially encashed after two years' premium contribution had been made. The encashment value would be equivalent to available units at that time.

A maximum of 60% of the value of units only was available for partial encashment. A 2% fee of the encashed amount would be charged. The remaining balance of units after encashment was to continue to participate investment profits and premiums had to

continue to be paid.

Clause 11 specifically prohibited cession by providing that: "no benefit under this policy shall be capable of assignment, alienation or being pledged as security."

It was common cause that the policies were subject to the general conditions and privileges and conditions accompanying them. Further, Zimnat managing director advised Wedzera to direct any queries or inquiries on the policies to its agent/broker or any of its offices. Pursuant to that advice Wedzera immediately raised queries with the agent of Zimnat on the issue of whether the investment fund was the same as the guaranteed maturity value and whether the policies could be ceded since clause 11 *supra* specifically excluded it. The agent made the plaintiff to understand that although the general conditions were applicable to cash pal, each policy was to be tailor made to meet particular individual needs. On 11 July 2001 the said executive agent Mr G Mutero and the assistant manager - Mr S Mbaya responded to the queries raised by the plaintiff in the following terms:-

"Dear Mr Nhodza,

RE: CASH PAL INVESTMENT PLAN: POLICY NOS. Z902867 and Z902854

We would like to confirm that Zimnat will issue you a covering note in case of using this investment for collateral before it matures. However, the amount which Zimnat will cover will be decided by you and management at the time of cession.

Once again we thank you for entrusting your business with us.

Yours faithfully

G Mutero
(Executive Agent

S. Mbaya
(Assistant Manager)

The plaintiff contended that the above letter confirmed that despite the provisions of the general conditions, each policy was to be tailor made to suit particular individual needs. Mr K Mbaya the

general manager seems to confirm the plaintiff's assertions. In a letter dated 6 May 2002 he had this to say about the cession of Policy No. Z902854 to Barclays Bank.

> "However, considering that you are one of our most valuable clients, we have decided we may offer you some security against the policy after the policy has run for two years. To that end we will engage our actuaries to give us an indication of the amount that can be ceded. In this process, we would like to consider all your policies for this purpose so that the cession amount is reasonable." (emphasis added).

On 12 March 2002 the Provincial Manager S. Mbaya had also represented to the plaintiff that Zimant would register the plaintiff's cessions. The representation was made in a letter addressed to Mr E Nhodza.

In response to the question whether the Investment Fund was the same as the Guaranted Maturity Value the executive agent addressed two identical letters to Mr E Nhodza on 10 July 2001 in respect of each of the policies in the terms quoted infra:

> "Dear Mr Nhodza
>
> RE: CASH PAL INVESTIMENT PLAN POLICY NUMBER Z 902854 AND Z902867
>
> We would like to confirm point (d) of our letter dated 9 July 2001, that the investment fund is the Guaranted Maturity Value of $487 195 971,00. Since the premium escalation is optional, please note that, we have changed it to zero percent and this has been done without prejudicing your fund value.
>
> Like any other correspondence, this letter is part of the document and should be kept inside the investment document...."
> (my underlining)

In light of the assurances given by different official of Zimnat that plaintiff's cessions would be registered, plaintiff went and applied for loans from Barclays Bank Zimbabwe Limited and Stanbic Bank of Zimbabwe Limited for amounts of $10 million and $225 million respectively. Plaintiff intended to cede part of the benefits of the policies accruing to it in July 2003 (under the encashment of benefits of up to 60% of the Investment Fund) as security.

That was not to be since defendant made a complete about turn and declared that plaintiff could not cede the benefits of the policy and that the Guaranted Maturity Value was in fact totally different form the Investment Fund. It also stated that its Executive Agent had misconstrued the terms of the policy.

The plaintiff felt that the written representations by defendant's agent, provincial manager and the general manager formed part of the contract and that with reference to cession, they amounted to a novation of the policy document.

The above officials were acting in the course and scope of their employment with defendant. They were acting under the defendant's authority and full knowledge. Defendant was thus bound by their representations which allegedly induced plaintiff into entering into the contracts with defendant. Plaintiff therefore felt that it was entitled to use the benefits of the policies as security for its loans with the two banks as it was a clear contractual term and privilege under the insurance policy.

Plaintiff concluded that it had a legitimate expectation that it could cede the said policies as security arising form the written representations of defendant's high ranking officials.

In its plea defendant could not deny that its high ranking officials did make the representations to the plaintiff. But it pleaded that the policy document sets out the terms and conditions of the contract between the parties, and that any interpretation thereof is not the function of, nor within the mandate of any agent or other employee.

It denied that the contract between it and the plaintiff had been in any manner novated, or that it had been in any manner amended, as had been alleged by the plaintiff. It further denied that plaintiff was entitled to anticipate in these proceedings the issue of the policy encashment as at the second anniversary of the commencement of the policy. In the result it asserted that these proceedings were premature.

Furthermore, the defendant denied that it had any contractual obligation to register cessions or issue guarantees in terms stipulated by a third party to the contract.

The issues that were to be decided by this court at the trial were these:

What exactly were the terms of the cash pal investment policy and in particular;

a) Was there an amendment or novation to the policy and if so to what extent was the policy amended or novated?
b) Do the policy conditions allow the defendant to cede the policy as security for a debt in terms of which the defendant will guarantee the payment of such debt?
c) To what extent would the defendant be obliged to give such security?

The plaintiff called Mr Eric Nhodza who is its chief operations officer. His evidence repeats what the above assertions contained in the plaintiff's declaration. He emphasised that during discussion he was assured, as is illustrated in the above letters written by the defendant's officials, that he could cede the policies.

It was also confirmed that the Investment Fund was the Guaranted Maturity Value of $487 195 971,00. He was assured of an unconditional encashment of up to 60% of the Investment Fund after 2 years from date of policy, free from any deductions, taxes or imposts.

It was his evidence that during discussions he had reduced the 20% escalation to zero percent and yet the Policy Schedule still reflected as 20%. It was, however, again reduced to zero percent after he had raised a query.

Pursuant to the assurances that the policies could be ceded Mr Nhodza applied for loans from the two banks. He was then disappointed to be told that he policies could not be ceded. The defendant relied on clause (11) of the policy document.

According to Mr Nhodza the defendant was also saying plaintiff

was not entitled to encash 60% of the maturity value after two years. To him the policy encashments were the main attractions of the policies otherwise he would have never entered into the contracts as doing so would not have made business sense.

The plaintiff closed its case after the evidence of Mr Nhodza where

upon the defendant applied for absolution from the instance.

In such applications the question that should always be asked is this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment of the plaintiff? See *Supreme Service Station (1969) Pvt) Ltd v Fox & Goodridge* (*Pvt) Ltd* 1971 (1) ZLR 1 at 5D and *Standard Chartered Finance Zimbabwe Ltd v Georgias & Another* 1998 (2) ZLR 547 at 552G to 553D. "In case of doubt at what a reasonable court "might" do, a judicial officer should always, therefore, lean on the side of allowing the case to proceed" - see page 553B

Defendant submitted that the policy document sets out the terms

and conditions of the contract. The contract was not in any manner novated or in any manner amended. Any amendment would offend the parol evidence rule. In general the rule is that when a contract has been reduced to writing, the wring is, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence. See *Union Government* v *Vianini Ferro - Concrete pipes (Pvt) Ltd* 1941 A D 43 at 47. CORBETT JA (as he then was) commenting on the aim of the rule had this to say in *Johnston v Feal* 1980 (1) S A 927 (A) at 943 B-E:

> "...it is clear to me that the aim and effect of this rule is to prevent a part to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or move the writing by reference to extrinsic

evidence and in that way to redefine the terms of the contract."

Whether or not the document was intended to constitute the entire agreement between the parties can be determined by looking at the conduct of the parties. In *Minister of Home Affairs v Trom Agencies and Distributors* at 194B SANDURA JA had this to say:-

> "In the present case, in order to determine whether the document constitutes the agreement between the parties it is necessary to look at the conduct of the parties. Did they treat the document as being the entire agreement between them? I do not think so. Their conduct did not indicate that their contract had been "integrated into a single and complete written memorial."

In casu, documents filed of record seem to indicate that the parties did not intend the contract document to constitute the entire agreement between them. There are a number of factors pointing to that. Some of them are these. While the document specifically prohibited cession the parties were negotiating cession with each other. The defendant was even assured that it could cede the policies.

While the policy document stipulated an escalation of 20% the parties negotiated with each other its reduction and it was at some stage reduced to zero percent. The parties agreed that the encashment would be done free of deductions, taxes imposts or levies yet the policy document clearly stipulated that a 2% fee of the encashed amount would be charge. Defendant had turned round and began to assert that plaintiff was not entitled to a partial encashment of up to 60% of the value of investment units provided two years" premium contributions had been made yet there is a clear provision for that in the policy document. The defendant's agent did not treat the policy document as the entire agreement between the parties since he stated in his letter that other correspondence would form part of the agreement including his letter to Mr Nhodza. This conduct by the parties to the agreement clearly shows that they did not regard the policy document as constituting the entire agreement

between them. Both parties were represented by their high ranking officials. The defendant cannot turn round and say it is not bound by representations made by its executive agent, assistant manager, provincial manager and general manager.

These are senior official of the company. I hold a view that the defendant did not regard the policy document as constituting the entire agreement between it and plaintiff that is why it was so willing to make so many amendments to the document. I also find that the plaintiff through its agent amended the contract to allow the defendant to cede its policies which is what the plaintiff was about to do.

It seems to me that, in the absence of evidence from the defendant; the evidence led by plaintiff is sufficient for a court to make a reasonable mistake and give judgment for the plaintiff.

In the result the application for absolution is hereby dismissed, and the case is allowed to proceed.

Sawyer & Mkushi, plaintiff's legal practitioners
Atherstone and Cook, defendant's legal practitioners