

SITHEMBILE CHIPERE

[In her capacity as the surviving spouse & Executrix dative of the Estate late Tsaurayi Tungamirai Chipere, DR 1022/12]

versus

TEL.ONE ZIMBABWE (PVT) LTD

and

MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE

CHITAKUNYE J

HARARE, 22 June 2016

CIVIL TRIAL

C. Chipere for the plaintiff

T. Dondo for the 1st defendant.

CHITAKUNYE J. On 13 October 2005 the late Tsaurayi Tungamirai Chipere and the first defendant entered into a written contract of employment in terms of which the late Tsaurayi Tungamirai Chipere (herein after referred to as the late Chipere) was engaged by the first defendant as the Head Network Planning and Development.

Besides the salary the contract provided for a number of non-pay benefits. The non-pay benefits included, *inter alia*, group life Assurance, Self Assurance and Group Personal Accident schemes.

The late Chipere passed on at Harare on 12 May 2012 and at the time of his death his monthly gross salary was USD3 808.42.

On 16 August 2012 the second defendant duly appointed the plaintiff as the executrix dative of the Estate late Tsaurayi Tungamirai Chipere.

In November 2012 the plaintiff made a demand for provision of a self assurance plan pension payment in the sum of USD89 730-00 from the first defendant in terms of the above mentioned contract of employment. The sum was two times annual salary in the form of lump sum.

The first defendant did not meet the demand instead pointed out that the self assurance plan did not entail a lump sum payment as was being demanded by the plaintiff.

Upon failing to reach agreement the plaintiff issued summons from this court. She alleged that the relevant material terms of the contract of employment between her late husband and the first defendant were that:

The first defendant would pay her late husband a salary at the rate of ZW \$ 25 090 809-00 per month, payable in monthly instalments in arrears and that the first defendant may increase the salary as agreed to and applicable for that level, and the first defendant would provide a self assurance plan under which, upon the Head Network Planning and Development's death, the first defendant would pay two times annual salary in the form of lump sum and monthly pensions to the surviving spouse and children.

At the time of her late husband's death on 12 May 2012, his monthly salary was USD3 738-75.

The plaintiff's claim was thus for:

1. Payment of USD89 730-00 being the two times annual salary due and owing by 1st Defendant to the plaintiff in terms of a self assurance plan.
2. Payment of interest on the amount stated above at the prescribed rate of 5% per annum calculated from date of summons to date of payment in full.
3. Payment of costs of suit on a legal practitioner and own client scale.

The first defendant denied liability. In its plea the first defendant contended that the correct agreement of the parties did not provide that defendant would provide a Self Assurance plan under which upon the Head of Network Planning and Development's death the defendant would pay two times annual salary in the form of lump sum and monthly pensions to the surviving spouse and children as portrayed in Clause 5.3.11 of the contract document produced by plaintiff.

The first defendant contended that the correct clause 5.3.11 of the Contract document plaintiff's husband and all other employees in his position entered into provided for a Self Assurance Plan under which at the employee's death the first defendant would pay two times annual salary in the form of monthly pensions to the surviving spouse and children. That pension was not to be paid as lump sum but as monthly payments.

The first defendant thus contended that the contract document tendered by the Plaintiff was not the correct contract document that the plaintiff's late husband entered into with the first defendant.

In the alternative the defendant contended that if it is found that the document plaintiff submitted is binding, the defendant pleads that the document contains a *justus error* and the defendant would not be bound by that part of the document.

At a pre-trial conference held on 13 October 2013 parties agreed that issues for trial were as follows:

- a) Is the agreement relied upon by Plaintiff the correct agreement entered into between Plaintiff's husband and 1st Defendant?
- b) Whether or not Clause 5.3.11 of the agreement contains a *justus error*.
- c) In the event that the court finds that the agreement was entered into between Plaintiff's husband and 1st Defendant, is Plaintiff entitled to the relief sought?

The plaintiff gave evidence and tendered a number of documents in support of her case. The first defendant thereafter gave evidence through its Human Resources Manager, Mr. Themba Chiweshe. He also tendered documents into evidence in support of first defendant's case.

The plaintiff's evidence was to the effect that she is the surviving spouse of the late Tsauryi Tungamirai Chipere who died on 12 May 2012. On 16 August 2012 she was appointed executrix dative of the estate of her late husband

After the death of her husband she found amongst his documents a contract of employment between her late husband and the first defendant. Upon perusal she noted that amongst the provisions in the contract was Clause 5.3.11 which provided, *inter alia*, that Tel-One would pay two times annual salary in the form of lump sum and monthly pensions to the surviving spouse and children. Upon this discovery she duly contacted the first defendant with a view to being paid the said lump sum amount. She was asked to bring the contract document to defendant. When she did so, the first defendant through its Human Resources Manager, Mr. T Chiweshe, indicated that that particular provision was an error.

At that time Mr. T Chiweshe could not find the first defendant's own copy of the contract and so took a copy from the plaintiff with a view to checking on their own copy.

On 11 April 2013 the first defendant in response to the plaintiff's letter dated 30th November 2012 stated that there was an error in the late Chipere's contract in the inclusion of the provision under the self assurance scheme that a lump sum payment, twice the annual salary and monthly pensions would be paid to the surviving spouse and children. The plaintiff stated that as at the time of receipt of this letter the first defendant had not stated that its own

copy of the contract had a different clause. She thus cast aspersions as to how the contract document the first defendant now produced had a clause different from the one she had.

Thus as for the first issue the plaintiff insisted that the contract document she tendered must be accepted as the correct agreement between her late husband and the first defendant.

The first defendant's witness on the other hand contended that its contract document be accepted as the correct agreement. Mr. T Chiweshe conceded that in as far as the plaintiff's document purports to have emanated from the first defendant it was an error for the document to have clause 5.3.11 which is different from the contract document the first defendant had. He could not explain how the first defendant could have issued the document with such an error.

In a bid to confirm that the plaintiff's document was not the correct one Mr. Chiweshe tendered two contract documents for other employees in the same category as the plaintiff's late husband. It was noted that clause 5.3.11 in those two contract documents were similar to the clause in the late Chipere's contract document tendered by the first defendant.

From the evidence adduced on the contract document it was clear to me that this a single witness against another single witness. There was not much evidence from which issues of credibility could be satisfactorily ascertained. The documents produced were not challenged in any serious way on their authenticity. It would have been of great assistance had effort been made to have the documents examined by experts to establish if either of the documents could have been a result of some manipulation. In the absence of such evidence I cannot with certainty conclude that one of the parties tampered with the original document. Whether the discrepancy in clause 5.3.11 was there from inception or not is something that cannot be decided on the evidence adduced.

On the second issue it is common cause that the first defendant's initial reaction was to indicate that the provision for the payment of two times annual salary in the form of lump sum and monthly pensions was an error.

It is in this regard that the issue of *justus error* was argued. Not much was stated on the circumstances in which the error could have occurred. The first defendant's counsel seemed to abandon this defence in his submissions.

As alluded to above, the first defendant contended that other employees in plaintiff's late husband's category of Head of Department, were employed under the same terms and conditions of service. The conditions of service, including non pay benefits for heads of departments, were similar except the salary which deferred according to each department. In

this light the witness tendered contract documents in respect of two of such employees, namely Cephas Chikwaya (exh. 5) and Neveson Musoni (exh.6). As already noted above the terms and conditions in the contracts were the same as the late Chipere's contract. The difference was only on the salary.

Clause 5.3.11.in each of the contract documents provides in paragraph 2 that in terms of the Self Assurance plan which the company provides upon the death of the employee:

“the company will pay two times annual salary in the form of monthly pensions to the surviving spouse and children.”

It was also the first defendant's argument that once the two times annual salary was paid as a lump sum nothing would be left for monthly payments. The payment of the entire sum as lump sum would thus be contrary to the dictates of the self assurance plan which was to make monthly payments from the assured amount.

To further buttress its case the first defendant tendered exhibit 8, which is the parent insurance document titled 'PTC SELF INSURANCE PLAN.' This is the Plan that governs the insurance plans each employee's contract contains. Rule 9.1 of Part 2 of the PTC Insurance Plan states, *inter alia*, that:

“All payments of Spouses Pensions or Children's Pensions shall be made monthly, unless the Trustees determine otherwise.”

In *casu*, it was never argued that the trustees had determined otherwise which means in terms of this plan the pension payments were supposed to be monthly.

Clearly clause 5.3.11 of the plaintiff's document is contrary to provisions provided for in other employees' contracts yet they were in the same grade and enjoying similar non pay benefits. Further this clause in plaintiff's document is contrary to the provisions in the mother document from which the Self Assurance plan scheme is derived.

The first defendant's contention in this regard was that the late Chipere as head of department knew the conditions of the pension plan and that such conditions were similar to those of other heads of departments.

In so far as the employee is now late it cannot be ascertained whether he knew or did not know about the error on the contract document he had or even that it differed with the one retained by the first defendant.

The third issue is whether plaintiff is entitled to the relief sought. In the light of my above findings it is clear that plaintiff is not entitled to the relief she seeks. She has not proved her case on a balance of probabilities to be entitled to the relief.

It may also be noted that as regards quantum the plaintiff was not certain on the figure to use in arriving at the sum of \$89 730-00. In the pleadings she alleged she used the salary of \$3 738.75. Under cross examination she could not explain why she chose that figure instead of the late Chipere's basic salary of \$2 991.00 or his gross salary of \$3 808.42. Obviously on this aspect she would need the expertise of those in the know on the calculation of pension payments.

I am of the view that the plaintiff has not proved that she is entitled to payment of 'two times annual salary in the form of lump sum and monthly pensions' as against the payment of 'two times annual salary in the form of monthly pensions' as contended by the defendant.

Accordingly the plaintiff's claim is hereby dismissed with costs.

Charamba & Partners, plaintiff's legal practitioners
Dondo & Partners, first defendant's legal practitioners