IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2019/HP/A040

B E T W E E N:

ZISC LIFE LIMITED — **APPELLANT**

AND

WALUBITA NAWA — **RESPONDENT**

Before Honourable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 14th day of April 2020

For the Appellant : *Mr. M. Nsama, In-house Counsel, ZSIC Life Limited*

For the Respondent : *In Person*

J U D G M E N T

Cases Referred To:

1. *RTS Flexible Systems Limited v Molkerei Alois Muller GmbH & Co KG (UK Production) (2010) SC 14*
2. *Sable Hand Zambia Limited v Zambia Revenue Authority (2005) ZR 109 (SC)*
3. *Nkongolo Farm Limited v Zambia National Commercial Bank Limited and Others SCZ Judgment No. 19 of 2007*

Works Referred To:

1. *Bullen and Leake and Jacobs, Precedent of Pleadings 13th Edition, Sweet & Maxwell London UK 1990*

1. Background

1.1 This is an appeal against the judgment of the subordinate court of Kaoma delivered on 17th May 2017 by Honourable B. Hamasaki. The facts leading to the appeal are that on 28th January 2016, the

respondent sued the appellant for damages for breach of contract of an education policy and costs. On 17th May 2017, the court delivered judgment in favour of the respondent.

2. Grounds of appeal

2.1 Discomposed by the outcome, the appellant filed an appeal into Court on 10th October 2018, advancing the following grounds:

> "1. **That the learned trial magistrate in the court below erred in law and fact when he stated in the judgment that the respondent was paying both the monthly and yearly premium when this was not factually correct.**
>
> 2. **The learned trial magistrate erred in law and in fact when he held that fraud was involved in the transaction between the appellant and the respondent."**

3. Heads of argument

3.1 The appellant and respondent filed heads of arguments into Court on 27th February and 5th March 2020 respectively. I shall not reproduce the arguments save to state that I will refer to them in the judgment.

4. Determination

4.1 I have considered the grounds of appeal and heads of arguments filed herein and will deal with them in the manner that they were raised.

4.2 **Ground 1- That the learned trial magistrate in the court below erred in law and fact when he stated in the judgment that the**

respondent was paying both the monthly and yearly premium when this was not factually correct.

4.3 In support of **ground 1**, Counsel submitted that the respondent applied for a 3 year tertiary education policy from the appellant, which ran from 1st September 2012 to 1st September 2015. The amount assured was ZMW 2,982.98 and the premium was paid in monthly installments of ZMW 98.36 covering a yearly period under the policy document exhibited as "**CC1**".

4.4 Counsel further submitted that the learned trial magistrate erred in law and fact when he held that the premiums paid by the respondent were monthly and yearly because the monthly installments were spread over a twelve months period and equivalent to yearly premium cycle.

4.5 Counsel argued that the appellant was not obliged to cover the respondent's child's full fees at Lusaka Apex Medical University because they were 3 times in excess of the assured amount in the policy. Accordingly, the respondent was only entitled to the sum assured (ZMW 2,982,978 unrebased) with interest earned on the policy. He however, declined to collect the payment after it was prepared because it was insufficient to cover his child's fees at Lusaka Apex Medical University for a period of seven years.

4.6 Counsel went on to aver that at the material time, the respondent's child's tuition fees for 2015 was ZMW 5,500 far more in excess of what was assured. Thus, the lower court misdirected itself when it ordered the appellant to pay the respondent additional money after an assessment.

4.7 In response, the **respondent** contended that he applied verbally for a three year tertiary education policy to the appellant on the dates indicated. In his view, the assured amount was more than ZMW 2,982.98 and he paid monthly and yearly premiums of ZMW 98.36 as shown in the exhibits marked "**NW5**" and "**NW10**". He dismissed the exhibit "**CC1**" averring that it was not the correct policy document and did not bind the parties.

4.8 The respondent further contended that exhibit "**CC1**" did not bear his signature and the parties were not bound by that contract but the arrangement in which; the appellant agreed to pay tertiary fees for his son and not the sum assured, in return for the monthly premiums paid by the respondent for 3 years.

4.9 The respondent averred that he did not expect the appellant to pay his child's full tertiary fees but a fair amount of the costs. He denied that he received the sum assured of ZMW 2,982,978 (unrebased)

with interest but rather a payment of the money wrongfully deducted on his payslip by the appellant.

4.10 After considering the rival positions, I find it convenient to begin with, some relatively uncontroversial prepositions of law of contract stated in the case of **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)**[1], by the Supreme Court of the United Kingdom as follows:

> **"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."**

4.11 While the cited case is only of persuasive value, it in my view, sets out sound and correct legal principles applicable in our jurisdiction on the law of contract. It infers that where parties reach an agreement on all the terms of contract they regard (or the law requires) as essential, a contract will be deemed to have been formed. The essential requirements are that there must be an intention to create legal obligations and consideration.

4.12 The law will not always require commercially sound or sensible terms as long as it can be demonstrated that parties have agreed and valid consideration exists, upon which the parties can be held to their bargain. A court therefore, has no responsibility to re-write contracts for the parties but to ensure that their terms are enforced.

4.13 The means available is through an investigation of whether the parties objectively expressed to each other the type of contract they intended to be bound by. A Court should not attempt to impose the subjective thoughts of the parties, which never made it into the contract. If at all there were any pre-contract discussions which the parties engaged in but were never included in the final version of the contract; they are inessential in proving the parties' objective intention in their written contract.

4.14 At the heart of this dispute, is the appellant's school fees assurance policy, which was taken out in the respondent's favour on 27th December 2012. In the first section of the policy, the contracting parties obligations are described as follows:

"NOW THIS POLICY OF ASSURANCE WITNESSES that in consideration of the payment of the premium as provided in the Schedule the Company agrees that upon proof satisfactory to the Director of the Company of the happening of the events on which the sum assured is to become payable as described in the Schedule and of the title of the Claimant or Claimants

the Company will pay at its Offices in Ndola or Lusaka Zambia in the Lawful currency of Zambia the sum stated in the Schedule as the sum assured to the persons to whom by such Schedule the sum is payable.

It is declared that the Schedule and the priviledges and conditions endorsed on it are taken and read as part of the policy and the contract between the Life Assured and Company.

BENEFITS

(a) All benefit payments mentioned in the Schedule shall be payable to the Parent/Guardian or the named beneficiary(ies) under this policy. Where the named beneficiary(ies) are not in existence or lack the legal competence to claim then such other beneficiary(ies) as recognized by law may be paid the benefits under this policy.

(b) The Guaranteed Annual School Fees shall be payable on the anniversary of the due dates shown in the Schedule.

(c) In the event of death of the Parent/Guardian within the premium paying period, all future premiums shall be waived, but Guaranteed Annual School Fees, together with accrued bonuses if any, shall be payable on the due dates. However, in the event of death of the nominated child before school fees become payable, all premiums paid shall be refunded together with compound interest

PREMIUMS

A yearly premium is due on the Commencement date and on the anniversary of the Commencement Date until and including the Last Payment Date or the death of the Life Assured. The yearly premiums may

be paid in installments, the frequency, amount and due dates of such installments, if any, are shown below...."

4.15 As far as the Court is concerned, the parties contract is contained in exhibit **CC1.** In the absence of any other version capable of disposing the appellant's, I do not accept the respondent's argument that the exhibited contract is not the correct copy. Besides, his details and son's which are shown on the personal data field could only have been provided by the respondent.

4.16 If the respondent had any reservation with the assailed version, he should have raised it at trial and not on appeal. Be that as it may, the schedule in the policy document shows that the assured sum was ZMW 2,982,987.00 unrebased. The premium was described as YEARLY and could be paid in installments. On my inspection of the policy document, I find that there is no provision for monthly premiums but a yearly one which could be paid in installments (including monthly frequencies)

4.17 My finding therefore, is that the respondent signed up for a policy that was payable under a yearly premium and was only entitled to the money he saved. His claim that the appellant agreed to pay him extra money outside the policy is inconceivable. Insurance policies operate on the principle that an insurer will only pay the insured the amount stated in a contract. Thus, what was due to the respondent

in this case is the amount assured with interest, that is ZMW 3,660.00 as shown in exhibit "**CC3**".

4.18 I further find that the respondent's claim that the appellant overcharged him on the policy has no basis as it was not canvassed in the lower court. Therefore, he cannot seek a remedy on appeal. Ultimately, I hold that ground 1 of appeal has merit and succeeds.

4.19 **Ground 2 - The learned trial magistrate erred in law and in fact when he held that fraud was involved in the transaction between the appellant and the respondent.**

4.20 In **ground 2**, the appellant contended that the respondent freely and voluntarily applied for the policy. Therefore, the lower court's finding and holding of fraud was neither supported by the parties contract nor specifically pleaded by the respondent.

4.21 In fortifying his assertion, counsel referred the Court to the case of **Sable Hand Zambia Limited v Zambia Revenue Authority**[2], where the Supreme Court held that:

> **"Where fraud is an issue in the proceedings, then a party wishing to rely on it must ensure that it is clearly and distinctly alleged. The party alleging fraud must equally lead evidence so that the allegation is clearly and distinctly proved."**

4.22 On the other hand, the **respondent** argued that the lower court properly directed itself when it found that he was defrauded because the appellant misinformed him about the policy document.

4.23 The learned authors of **Bullen and Leake and Jacobs, Precedent of Pleadings 13th Edition** at page 427 citing with approval the cases of *Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489* state:-

> **"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (|). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice".**

4.24 In one of the leading authorities on fraud in our jurisdiction, the case of **Nkongolo Farm Limited v Zambia National Commercial Bank Limited and Others**[3], the Supreme Court elucidated the principles of fraud as follows:

> **According to the learned authors of Halsbury's Law of England 4th Edition volume 16, paragraph 1219:**
>
> **".... the Court has never ventured to lay down as a general proposition, what constitutes fraud. Actual fraud arises from acts and circumstances of**

imposition. It usually takes the form of statement that is false or suppression of what is true. The withholding of information is not in general fraudulent unless there is a special duty to disclose it."

Furthermore, it is vital for a plaintiff to specifically set out the particulars of the fraud alleged. Volume 36 of the Halsbury's Law of England paragraph 36 states that:

".....where a party relies on any misinterpretation, fraud, breach of trust, willful default or undue influence by another party...he must supply the necessary particulars of the allegation in his pleading."

In another English case of Joseph Constatine Steamship Limited v Imperial Smelting Corporation Limited (7), it was stated at page 191, that:

"....there is, for example ,no presumption for fraud. It must be alleged and proved.

I have looked at the pleadings filed herein, particularly the plaintiff's statement of claim and I find that no fraud is alleged in the said pleadings. I have also looked and considered all the evidence adduced in this case and I must say that I find that no fraud on the part of the 1st defendant has been proved. Indeed the decision in the case of Joseph Constatine Steamship Line Limited v Imeprial Smelting Corporation Limited (7) supra, that there us no presumption for fraud and that it must be alleged and proved, is on all fours with this case on this issue."' I have already found as a fact above, that all these documents were signed by the plaintiff's directors voluntarily. That they chose not to read what they were signing because of the story or explanation that the 3rd Defendant gave them is certainly not evidence or ground to claim undue influence, neither can this be a basis to claim misrepresentation. The documents did not minrepresnt any facts. They were clear.

4.25 It follows, from the cited authorities, that fraud is essentially a common law tort of deceit and its essentials are:-

a) false representation of an existing fact;

b) with the intention that the other party should act upon it;

c) the other party did act on it; and

d) the party suffered damage.

4.26 In addition, since fraud is a serious accusation it procedurally has to be pleaded and proved to a standard above a balance of probabilities. Thus, a person who alleges fraud would have to demonstrate the following elements:

i) a particularized claim on fraud with sufficient detail;

ii) evidence on that threshold to show that the defendants by themselves and/or in collusion with others fraudulently procured their certificates of title.

4.27 It is clear from the record that the respondent never pleaded fraud before the lower court. Hence, the lower court's finding had no basis and amounted to a misdirection. Consequently, I hold that this ground of appeal has merit.

5. **Final Orders**

1. The appeal succeeds and the judgment of the lower court is set aside.

2. Each party will bear their own costs.

Dated this 14th day of April 2020.

M. Mapani-Kawimbe
HIGH COURT JUDGE