

HC 3215/01
JUDITH MASIKA in her capacity as administrator of
The Estate of the Late
SHACKIE MASIKA
versus
AFRICA ENTERPRISE

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 8 October, 2003

Trial Cause

Mr Gumunyu for the plaintiff
Mr Shenje for the defendant

HUNGWE J: Plaintiff is the executor dative in the estate of the late Shackie Masika who died on 14 October, 1998 in a road traffic accident. She was married to him. At the time of his death the deceased was employed by the defendant, an evangelical organisation. He was also a member of the Africa Enterprise Group Pension Fund underwritten by Old Mutual.

At the time of his death, the deceased's income was \$88 800,00 per annum which income entitled his estate, upon his death, to receive twice that sum plus a refund of all contributions. The further condition to the entitlement however was that the contributor undergoes an HIV test.

As the late Masika had not undergone this test, at the time of his death, Old Mutual only paid an amount of \$100 000,00 instead of \$177 600,00.

Disappointed, the executive dative sued for the difference of \$77 600,00 on the basis that the defendant acted negligently in failing to timeously inform Old Mutual thereby causing the loss on the estate in that sum.

In its plea the defendant denied liability on the basis that deceased's salary was increased to \$88 800 per annum in September, 1998 with effect from July 1998. Since it had submitted increased pension contributions reflecting the increase during the month of

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October, 1998, it had therefore duly notified Old Mutual and had discharged its duty in that regard. In any event deceased was also duty bound to ensure that his Insurance Company was duly notified of changes in his income. He had omitted to do so and therefore the defendant could not be held liable.

The matter went to trial on the issues -

- (a) whose duty was it to inform Old Mutual of changes in defendant's staff salaries?
- (b) Was Old Mutual timeously notified of the late Masika's salary changes?
- (c) Is defendant liable for damages suffered by plaintiff?

Plaintiff's evidence was that had the defendant updated her husband's cover she would have been paid twice his annual gross salary upon his death. In her view because the employer neglected to advise the insurer of the new salary it paid to the husband she had suffered loss in the sum of \$77 600. She had made several trips to the defendant's office in connection with this matter and finally held discussions with representatives of Old Mutual who worked out the benefits for her. In its first letter to her Old Mutual wrote -

"We enclose our cheque for \$153 724,16 which represents the death benefit payable. Please note that the measures Group Life Assurance benefit was restricted at \$100 000,00 cover as we were not advised of the member's salary of \$88 800 which would have triggered us to request for medicals. Please also note that this is the full and final death benefit payable from our offices".

A month later Old Mutual again wrote -

"We have since established that the Annual Due Return advising us of a members new salary was received on 13 October, 1998. Unfortunately the member died the very next day on 14 October, 1998 before Old Mutual had an opportunity to request for medicals from him.

Therefore Old Mutual has no option but to restrict the Group Life Assurance benefit to \$100 000,00 which is the HIV testing limit on the scheme (members enjoy automatic cover without the need to undergo an HIV test). The late member's spouse then received a total benefit payout of \$154 729,16 which included \$54 729,16 being a refund of member's own contributions plus interest".

Plaintiff admitted that the method of notification employed between

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defendant and Old Mutual under cross-examination. The question was put to her how defendant was to notify Old Mutual? Her response was that defendant would notify Old Mutual by completing forms that are required for that purpose once or twice yearly. That to me is the crux of the matter. Both plaintiff and defendant are agreed that this was the method required for the fulfilment of the defendant's duty to inform Old Mutual of the members salary levels. Mr. Hove, who gave evidence for the defendant indicated in his evidence that Group Life Assurance benefits are subscribed to by the defendant's on behalf of its staff as a group. In terms of the terms and conditions of that contract, where there is an increase in salary levels as reflected in the group this is similarly reflected in the premiums paid to Old Mutual.

On receiving an increased premium Old Mutual would send a form requesting a break down of the member's individual salary. Those that qualified would then be requested, if they so desired, to submit to HIV tests. Exhibits 10, 11 & 12 reflect that during this period the group's monthly salary bill rose from \$32 013,01 for July 1998 to \$41 733,00 for September 1998. The September 1998 bill from Exhibit 12, was submitted to Old Mutual on 25th September, 1998. Old Mutual acted on it by sending the Annual Due Return form to the defendant requiring an individual break down of the employee's salaries. That must be the response from the defendant which Old Mutual refers to in Exhibit 6 - the letter dated 25 January, 2000 which it says was received a day before deceased died.

The question then arises who in the circumstances had the obligation to inform Old Mutual. It seems to me that the answer must be found in the terms setting out the contract, Exhibit 7. It states in that contract that -

"The proposer shall provide the Insurer with such details concerning the members or employees eligible to participate, as the Insurer, may require".

By submitting to Old Mutual the premium reflecting an increase in the premium paid by the employees, defendant discharged its obligations under the contract. This is the method of notification that the insurer required. It did not require the employer to address an individual letter speaking on each respective

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employee's behalf. It was then up to Old Mutual to request the individuals' specific earnings in the Annual Due Return once a year. When that information was then at hand, Old Mutual would then specifically request the individual, by a private and confidential communication to him/her, to undergo an HIV test if he wished to enjoy the doubled gross salary cover in excess of \$100 000,00.

This, as I understood the evidence, is the factual position.

As I said once defendant remitted the information required by Old Mutual in terms of Clause 3.9(1) of the Contract, its obligation to submit information would have been discharged. If the event insured against then occurred, the risk would have to be borne by the insurer. This is trite. It follows from the above that having passed on all the relevant information to Old Mutual in terms of the contract, it is to Old Mutual that the plaintiff should have sought its remedies for the loss suffered. Unfortunately plaintiff did not join Old Mutual as a party to these proceedings. They ought to have because it is the underwriter of the insurance cover, and also because it is finally to blame for having set out a flawed system of policy updating and information flow systems.

In the present circumstances I am unable to find any basis for liability for the loss suffered on the defendant. In the result the claim is dismissed with costs.

***Sawyer & Mkushi* , plaintiff's legal practitioners
Ziombe & Mtambanengwe , defendant's legal practitioners**