

NOT REPORTABLE

CASE NO: SA 27/2006

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ANNALIZE OPPERMAN (born Visagie)

Appellant

and

**MUTUAL AND FEDERAL INSURANCE COMPANY
NAMIBIA LIMITED**

Respondent

Coram: MARITZ JA, STRYDOM AJA and CHOMBA AJA

Heard: 4 April 2007

Delivered: 29 November 2016

APPEAL JUDGMENT

STRYDOM AJA (CHOMBA AJA concurring):

[1] Argument in this appeal was heard on 4 April 2007 by three judges, namely Maritz JA, (presiding), myself and Chomba, as Acting Judges of Appeal. After having heard the argument on appeal and after further discussions the presiding judge allocated to himself the duty to write the judgment. During 2014 the presiding judge retired whilst writing of this judgment was still outstanding. The Chief Justice thereupon allocated to myself, being one of the three Judges who had sat on the appeal, to now write the judgment. I have now been informed that the learned presiding judge is for medical reasons no longer available to take part in the writing of

this judgment. However, two judges forming the majority of the court, can still give a valid judgment provided they agree. See s 13(4) of the Supreme Court Act, Act 15 of 1990. See also *Wirtz v Orford & another* 2005 NR 175 (SC).

Background

[2] The appellant was married to Peter du Bois Opperman from which marriage two children had been born. Opperman died on 20 March 2002 and the appellant, together with her two children, caused summons to be issued against the respondent in which they claimed the balance of death benefits which they alleged had accrued to the said late Opperman upon his death and through him to them as his beneficiaries. An alternative claim based on misrepresentation was abandoned by the appellant. The two children did not join in this appeal.

[3] During his life late Opperman was employed as the managing director of Fedsure General Insurance Namibia Limited (FGI). In terms of a sale of shares agreement concluded on 27 September 2001 the respondent took over the business of FGI and late Opperman was appointed as its managing director with effect from 1 November 2001. Late Opperman's conditions of employment with FGI included membership of the Fedsure Namibia Staff Pension Fund (FGI Fund) a registered pension fund established for employees of FGI. The respondent has its own pension fund, namely the Mutual and Federal (Namibia) Retirement Fund (M & F Fund). It is common cause that late Opperman joined the M & F Fund once the merger took off on 1 January 2002.

[4] After late Opperman had passed away the appellant was paid out pension and death benefits according to the rules of the M & F Fund which, so it was alleged, was less beneficial than what late Opperman would have received in the employ of FGI and as a member of the FGI Fund. The claim of the appellant rests on this difference as it was alleged by her that it had been agreed between late Opperman and the respondent whereby late Opperman was offered the same terms and conditions of employment by the respondent as he had with FGI, including the same pension and death benefits payable on his death occurring whilst in the employ of the respondent. The appellant now claims this difference as damages.

[5] There was further a distinction drawn between the appointments of late Opperman, the witness Barnard and one Katjimune and other members of the FGI staff joining the respondent. As previously stated Opperman was appointed on 1 November 2001 as managing director of the respondent and Barnard and Katjimune were likewise appointed respectively as general managers of the respondent. The rest of the FGI staff had to re-apply for positions in the respondent. Campbell, at the time the chief executive officer of the respondent, explained why this was necessary. According to his evidence it took time to finalise the merger but it was important to secure the positions of the top members of staff of the reconstituted company so as to assure the market that all was in order. It is however, common cause that until 1 January 2002, when the rest of the staff was incorporated into the respondent, all of

them, Opperman, Barnard and Katjimune included, had their salaries paid by FGI and made their pension contributions to the FGI fund.

Pleadings and evidence

[6] The pleadings and evidence were fully analysed and discussed by the learned Judge-President in the court *a quo* and I do not intend to repeat the exercise except in so far as is necessary for purposes of this judgment. It is clear that the learned judge was mindful of the rule that where one of the contract parties has passed away that it has a duty to scrutinise the evidence of the remaining party. (See *Cassel and Benedick NNO & another v Rheeder and Cohen NNO & another* 1991 (2) SA 846 (A).)

[7] The crux of the appellant's claim is set out in paras 7, 8, 9, 10 and 11 of the particulars of claim. In paras 7, 8 and 9 the appellant dealt with the benefits late Opperman enjoyed whilst still in the employ of FGI and more particularly those benefits he enjoyed as a member of the FGI fund. In paras 10 and 11 the appellant's claim to be paid these benefits is formulated as follows:

- '10. Opperman took up his appointment as managing director of defendant in terms of an express, alternatively tacit agreement in terms whereof defendant offered him the same terms and conditions of employment as those he had with FGI including the same death benefits payable on his death occurring while in the employ of defendant.

11. Plaintiffs accepted the said benefits by claiming it subsequent to Opperman's death, alternatively the acceptance is implied pursuant to the provisions of s 37C of the Pension Funds Act, Act 24 of 1956.'

[8] Further particulars were asked by the respondent. To these the appellant replied that Opperman's appointment as managing director was in writing on the terms and conditions as set out in paras 9 and 10 of the particulars of claim. It was further stated that the agreement set out in para 10 was partly in writing and partly oral. Certain of the questions such as where and when the agreement was concluded and who, at the time, acted on behalf of the respondent, were said to be peculiarly within the knowledge of the respondent and were refused.

[9] At a pre-trial conference further written questions were addressed to the appellant for purposes of trial preparation. Para 13 of the respondent's questionnaire the following was asked:

- '13. The plaintiff is referred to the answer furnished in reply to paras 9.10 and 9.11 of defendant's request for further particulars. The plaintiff is requested to clarify whether it is the plaintiff's case that the terms and conditions of the plaintiff's own pension scheme did not apply to Opperman's employment contract, but that the plaintiff was contractually bound to apply the terms and conditions of the FGI pension scheme only to Opperman's employment contract.'

(It seems to me that the last two references in the second sentence to the 'plaintiff' should read the 'defendant'.)

[10] Appellant replied as follows to this question:

'10. AD PARAGRAPH 13

It is plaintiff's case that defendant's scheme became applicable when defendant made Opperman a member thereof, but that defendant was contractually obliged to make up the difference in the benefits provided for under the FGI pension scheme and defendant's pension scheme.'

[11] As far as the respondent is concerned it admitted in its plea that Opperman was the managing director of FGI and that he was appointed in the same position with respondent with effect from 1 November 2001. The respondent however, denied that Opperman was entitled to be paid the same death benefits as those he had with FGI, either by the M & F Fund or by the respondent.

[12] The case for the appellant was mostly argued on the appointment of Opperman on 1 November 2001, his conduct after January 2002 and what was said by him to various witnesses after he had received his letter of appointment sometime during January 2002. The appellant testified that the late Opperman informed her that his pension and death benefits would be the same as what he would have received had he stayed in the employ of FGI. The witnesses Botes and Kruger, who are still in the employ of the respondent, testified that late Opperman had been dissatisfied with the conditions of employment and told them that he was not going to sign the letter of appointment dated 15 January 2002. They also testified that they were informed that

the merger would not adversely affect them. That was also the evidence of the witness Barnard.

[13] The respondent called various witnesses who testified that after January 2002 late Opperman was fully integrated into the M & F system, the same as all the other employees of FGI who came over to the respondent.

The appeal

[14] On the pleadings the onus was on the appellant to prove the agreement and its terms. (See *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A).) This was accepted by Mr Frank, SC, who appeared for the appellant, assisted by Mr Coleman. However, in argument before us counsel submitted that an answer given by the witness Louw, the human resources manager of the respondent, during cross-examination, changed the whole picture. This dramatic change in the case came about when counsel had asked Louw which fund would have been responsible for the payment of pension and other benefits, had Opperman passed away during December 2001, ie before the final integration into respondent on 1 January 2002. Louw's reply was that in that event the FGI fund, and the benefits thereunder, would have applied.

[15] As a result, of this answer by Louw, Mr Frank argued that this had been a clear admission by the respondent that when late Opperman was appointed as managing director of the respondent, on 1 November 2001, he was so appointed in terms of the

employment conditions he had enjoyed whilst in the employ of FGI. Respondent's attempt now to impose, as it were, unilaterally different conditions of employment cannot succeed. Counsel submitted that the admission had the result that the appellant had proven the alleged agreement contended for by her.

Furthermore, so Mr Frank submitted, the respondent did not, in the light of Louw's answer, amend its plea but, in any event, if it wanted to rely on acquiescence by late Opperman to the M & F pension conditions imposed, the onus would then have been on the respondent to prove such acquiescence. (See *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 (3) SA 267 (W)).

[16] I cannot agree with Mr Frank that Louw's answer under cross-examination brought about this dramatic change in the case. Firstly, the late Opperman did not pass away in December 2001. Secondly, it was no secret that the late Opperman had, until the full integration of FGI into the respondent, received his salary from FGI and made his pension contributions to the FGI Fund. The FGI Fund was not yet integrated into the M & F Fund and it seems to me logical, and in accordance with the facts as they were at that stage, that the FGI Fund, during this period, still applied as far as pension and death benefits were concerned. It further seems to me that on these facts counsel would have been able to raise the same argument and that he did not need Louw's answer in order to do so.

[17] I also agree with Mr Franklin, SC, (assisted by Mr Schickerling) for the respondent, that this argument ignores the evidence which was presented by the respondent.

[18] The first witness called by the respondent was its managing director, Campbell. The witness testified that he had a meeting with the late Opperman on 20 July 2001. On this occasion it was explained to the late Opperman that he would have to come over to the respondent on the latter's terms and conditions and he was also informed that there would have to be a realignment of the terms, particularly in regard to the structure of his salary, to bring it in line with the salaries other staff members of the respondent were earning. He was also informed that he would have to join the M & F Fund. On a question by counsel whether pension benefits were discussed at the meeting, Campbell said no and he explained that he had no authority to do so as the fund was a separate entity from the respondent. The witness further denied that he entered into an agreement with the late Opperman as alleged in para 10 of the appellant's particulars of claim or that he undertook on behalf of the respondent to make good any shortfall in the benefits provided for under the FGI Fund.

[19] This discussion with the late Opperman was followed by the letter of 10 October 2001 whereby he was appointed as the managing director of respondent. In the letter it was stated that he would soon be informed of the conditions of his appointment and his remuneration package. This was again followed by a letter dated 15 January 2002 containing the promised information as referred to in the letter of 10

October 2001. It was made clear by the letter that the late Opperman was required to join the respondent's pension fund and to apply for membership of its medical aid scheme or to provide proof of membership of another registered medical scheme.

[20] Another relevant document is called the salary conversion calculation which deals specifically with the salary structure of the late Opperman as an employee of the respondent in comparison to what he had received when still employed by FGI and the way in which his salary had been structured at that time. The salary payment slips reflected that until December 2001 his salary had been paid by FGI. This changed in January 2002 when the slips indicated that his salary had now been paid by the respondent. The salary conversion calculation also showed that there were differences in the structuring of the salaries. Examples were that the contribution made by the respondent towards the pension of the late Opperman were higher than those made by FGI. Furthermore, certain allowances which were paid separately by FGI were now lumped together as part of the salary of the late Opperman. The purpose of this salary conversion document was further to show that the costs to the company, ie the respondent, were exactly the same as those of FGI.

[21] Campbell further testified that he had another meeting with the late Opperman during the beginning of February 2002 but on that occasion, as well as at the following Board meeting of the respondent on 18 February 2002, no complaints had been raised by the late Opperman in regard to his salary payments. The witness

further testified that the late Opperman never raised with him any problems or queries in regard to his pension and death benefits.

[22] The witness Louw, the Human Resources Manager of the respondent, testified that there was a clear message to all FGI staff coming over to respondent that the respondent's conditions of employment would apply. These conditions and benefits were available on the M & F Intranet to which they all had access. Louw testified that he had a meeting with the late Opperman in the beginning of February 2002 where late Opperman raised certain matters of a general nature. The only issue raised concerning himself had been that he was not comfortable to pay market related rent for the house he was occupying. Louw stated that in this regard there was a difference between the nominal rental paid by officers of FGI and marketable rental paid now to the respondent.

[23] The last witness called by the respondent was Bezuidenhout, at the time the Chief Financial Officer of respondent. The witness testified that he met with the late Opperman during the period 3 to 5 February 2002. The late Opperman raised four issues with him, namely:

- (i) bonuses;
- (ii) the treatment of the benefit packages which FGI staff enjoyed which were now terminated when they came over to respondent and its effect on the payment of tax;

- (iii) the way in which respondent processed salaries was not aggressive enough bearing in mind the options available under Namibian Tax Law; and
- (iv) the late Opperman informed Bezuidenhout that he was not planning to go for a medical examination.

[24] In regard to points (iii) and (iv) above, it seems that FGI paid certain benefits, such as eg telephone allowances, which were not taxable in Namibia, separately whereas the respondent added these allowances to the salary which then became taxable. This resulted in the 'taking home salary' to be less in the latter instance. In regard to the issue raised under point (iv) Bezuidenhout testified that the late Opperman became a member of the M & F Fund and medical aid scheme as from the 1 January 2002. Both these schemes have a rule that relates to people relative to their seniority. This means that, depending on their seniority and salary grade, they would become entitled to certain benefits under the M & F Fund more so than other staff members if they submit themselves to a medical examination. The late Opperman opted not to submit himself to a medical examination as he was afraid that if it became known that he was suffering from leukemia that that would even affect those benefits which were guaranteed. It seems that although the respondent had been aware of late Opperman's medical condition those underwriting the death benefits were not aware thereof and he was afraid that if he should go for a medical examination, and fail, that that would affect his pension fund and death benefits, even those benefits which had been guaranteed. In order to improve the 'take home' part of

the salary the late Opperman proposed that a more aggressive stance should be taken in regard to those allowances which were not taxable according to Namibian law.

[25] Bezuidenhout further testified that he undertook to investigate this matter raised by the late Opperman.

[26] The discussions between Campbell and the late Opperman were soon confirmed by various letters and schedules. In the letter of 10 October 2001 wherein late Opperman was appointed, he was informed that his conditions of employment would soon be made known to him. This was followed by the letter dated 15 January 2002 in which those conditions were set out. He was, *inter alia*, informed that he was required to join the M & F medical aid scheme as well as the M & F Fund. It is common cause that late Opperman complied with these requirements. A document which drew a comparison between the position in FGI and M & F, regarding the structure and alignment of salaries and the contributions to be made, was given to late Opperman. This showed substantial differences in contributions to be made by the company and the way in which certain allowances were to be treated.

[27] The evidence presented by the respondent was left unchallenged. This, so it seems to me, is because the appellant did not know with whom the alleged agreement, contended for by the appellant, had been concluded or where or when it had so been concluded. Although she refused to answer these questions when

asked for further particulars by the respondent, the witnesses of the appellant, and she herself, were not able to take the matter any further.

[28] The learned Judge-President was critical of the way in which the respondent handled the merger and he rejected the respondent's version that late Opperman had been informed that he would have to join the respondent on its conditions of employment. I agree with the court *a quo* that late Opperman had not been informed of the details involved when joining the respondent. That is clearly proven by late Opperman's reaction to the structure of his salary package. However, in my opinion the probabilities favour the version of the respondent. Campbell's evidence that he had informed late Opperman that he would have to join the respondent on the latter's conditions is unchallenged and is further supported by the evidence of the witness Bezuidenhout that during discussions with late Opperman it was clear that he knew that he was an employee of the respondent on the latter's conditions of employment. Late Opperman had not raised any difficulties in this regard. This is again supported by late Opperman's attempt to rather change the terms of the existing M & F conditions, than to attempt to enforce an agreement that he had been appointed on the same conditions he previously enjoyed with FGI, so alleged by the appellant.

[29] It seems that the court *a quo*, by rejecting this evidence, held it against the respondent that it did not call other previous staff members of FGI, presently in the employ of the respondent, to come and testify what the circumstances were when they had been appointed. The court inferred from this that the respondent could not

call such witnesses because they would not have supported the evidence of the respondent. It is, first of all, not the only reasonable inference to be drawn. The successful outcome of the case strongly suggests that the respondent might have been of the opinion that its case was so strong that it was unnecessary to call such witnesses. Secondly, there was no onus on the respondent to prove anything.

[30] The case for the appellant changed from time to time. It started off by alleging that the agreement was partly written and partly oral. Then after Louw gave the answer to which I have referred above, it was submitted that that answer amounted to an admission that the late Opperman was appointed in terms of the FGI conditions, also in regard to his pension and death benefits. Consequently, by imposing different conditions of employment the respondent was attempting to unilaterally change the conditions of employment and the onus was now on the respondent to prove acquiescence by late Opperman to be bound by the new conditions. In my opinion this latter ground did not leave any room for a tacit agreement. Yet again in terms of an answer by the appellant to a questionnaire by the respondent the appellant replied in paragraph 10 that the late Opperman became a member of the M & F Fund but that the respondent was contractually bound to make good any deficit arising between the FGI Fund and the M & F Fund.

[31] Counsel for the appellant submitted that late Opperman had no knowledge of the M & F Fund's rules and death benefits and that he could accept that such rules and benefits were the same, or even better, than what he had enjoyed previously with

FGI. The witnesses on behalf of the appellant conceded that one could not expect that the rules of pension and death benefits of one company would be exactly the same as those of another company. The document by which a comparison was drawn between the structure of the salaries of FGI and M & F illustrated material differences in the contribution by the company and the employee and how the salaries were structured. It is significant that we are here not dealing with a clerk or receptionist in the offices of FGI or M & F but with the managing director of those two insurance companies. To suggest that the late Opperman had been wholly uninformed about these issues and that he could expect that those conditions would be the same seems to me to be no more than an assumption on the part of the appellant unsupported by the facts and probabilities.

[32] The witness Campbell made it clear that during discussions with the late Opperman the latter was informed that he would have to join the M & F Fund and medical aid scheme and the alignment and structure of respondent's policy in regard to salaries. This was followed upon by the documentary confirmations to which I have referred and which fully supported the evidence of Campbell as to what had been discussed by the parties on 20 July 2001.

[33] At no time had late Opperman objected to or complained about his pension or death benefits whereas in his letter dated 26 February 2002 he had raised various issues, *inter alia*, also the issue in regard to the structure of his salary package and that of Barnard and Katjimune. In discussions with Bezuidenhout, the financial

manager of respondent, he raised the point that respondent should take a more aggressive stance towards the fact that some allowances in Namibia were not taxable which would have the result of an improvement in the 'take home' salary of himself and others similarly situated. No mention was made of any prior agreement and nor was there any reliance placed on any such alleged agreement. What is significant is that this is clear evidence of his acceptance of the principle based on the costs to the company and he only requested that those allowances, which were not taxable in terms of Namibian tax laws, be separated from the salary component.

[34] Furthermore the appellant's shifting of the grounds by which she attempted to hold the respondent liable are, in certain instances, mutually destructive. The answer given in regard to respondent's questionnaire (para 10) implies that when the merger took place on 1 January 2002 the late Opperman joined and accepted the respondent's conditions of employment including the pension and death benefits. Only if the pension and death benefits were less than what he would have received from FGI would the respondent be under an obligation to make good the deficit. This is totally in contrast with Mr Frank's argument based on Louw's answer under cross-examination. In terms of this argument it was submitted by counsel that the late Opperman had been appointed on the employment conditions of FGI and by imposing the conditions of the respondent, the respondent was now attempting to impose its own conditions unilaterally. Also the wording of the answer namely that the respondent would in such an event be contractually bound to make good any deficit seems to me to indicate that the whole alleged agreement had been an expressed agreement. However, the evidence by the appellant's witnesses did not take the

matter further than that they had been assured that they would not receive less than what they had received from FGI.

[35] In his main argument counsel for the appellant limited his criticism to the findings made by the judge *a quo*. I have already dealt with some of the submissions herein before. A point was made by counsel that the board of trustees of the FGI Fund had authorised payment to late Opperman's beneficiaries indicating that the FGI Fund's benefits would apply and that this was agreed to by the respondent. However, the witness Louw explained that at the time the FGI Fund had still not been merged with the M & F Fund. Consequently it was still under the control of its own trustees. It was therefore necessary that those trustees had to authorise payment of any benefits still remaining in that fund. From what I have set out hereinbefore the only benefit remaining in the fund had been that share of the contributions by late Opperman and of FGI which was paid out to late Opperman's beneficiaries.

[36] Although late Opperman did not sign the contract whereby he had been appointed as managing director of respondent, and which also contained his conditions of employment, his subsequent conduct proved that he regarded himself bound by those conditions. He attended Board meetings in his capacity as managing director and did not raise any queries or objections whilst he knew what his conditions of employment with the respondent were. Specifically at the meeting of 18 February 2002, where his appointment as managing director was confirmed, one could have expected of him to say, at the very least, that he was still negotiating for better

conditions and that the confirming of his position as managing director was premature. His silence on this occasion leaves only the reasonable inference that he regarded himself bound by the respondent's conditions of employment and that his attempt to get the respondent to take up a more aggressive stance towards what was permissible in terms of the Namibian tax laws, had not been more than an attempt to persuade respondent to change the salary package. Mr Frank's suggestion to the witness Campbell that if the parties could not come to an agreement on this issue the matter would have become a labour dispute is not of real relevance bearing in mind that the court *a quo* came to the conclusion that the appellant did not prove the existence of an agreement as contended for by her.

[37] In regard to the evidence of the appellant it is clear that she knew very little about late Opperman's financial transactions. At one stage during her cross-examination she conceded that late Opperman's explanation to her had been based on the costs to the company principle. I do not think that much can be made of this and at best it could be said that it is not clear what had been explained to her. What is however clear, is that she knew nothing of what had further occurred between late Opperman and witnesses testifying on behalf of the respondent. It is clear that she did not know how he conducted himself and what had been discussed during meetings with these representatives. That also goes for the witnesses Barnard, Botes and Kruger.

[38] For the reasons set out herein before I agree with the learned Judge-President that the appellant did not prove, on a balance of probabilities, an express or tacit agreement as contended for by the appellant.

[39] In this instance the tacit agreement has no life of its own and can only exist on proof of some express agreement from which the facts clearly establish that the parties intended liability on the part of the respondent to make good any deficit arising between the benefits FGI would have paid and the benefits now received from the M & F Fund.

The fact that late Opperman did not sign the letter dated 15 January 2002 and made certain proposals regarding the tax position in Namibia do not give rise to a tacit agreement that respondent was liable to make good any deficit occurring between the FGI fund and the M & F Fund. In my opinion the conduct of late Opperman, during the relevant period, cannot be reconciled with an agreement, whether express or tacit, as contended for by the appellant.

[40] Generally the costs of the appeal would follow the result. However, the long delay of 9 years in this instance is a factor which I must consider. This delay occurred without the fault of any of the parties. However, to saddle after this long delay, the appellant with the costs of appeal may have a debilitating effect on her. More so for her than for the respondent. Whereas life for the respondent went on as before there is no telling what the effect of such an order would have on the appellant. According to the evidence she had to cover late Opperman's bank overdraft in an amount of

some N\$1 000 000. There is also the criticism levelled at the respondent by the learned Judge-President with which I agree. I have therefore decided to make no order of costs and let each party pay her or its own costs of the appeal.

[41] In the result the appeal is dismissed. Each party to pay their own costs.

STRYDOM AJA

CHOMBA AJA

APPEARANCES

APPELLANT: T J Frank SC (with him G B Coleman)
Instructed by Engling, Stritter & Partners

RESPONDENT: A E Franklin SC (with him J Schickerling)
Instructed by LorentzAngula Inc