THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 717 OF 1995

GUSTAVUS ADOTU :: PLAINTIFF

VERSUS

NATIONAL INSURANCE CORPORATION :::::::::::::::: DEFENDANT

BEFORE: HON. JUSTICE ELDAD MWANGUSYA

JUDGMENT

The plaintiff, GUSTAVUS ADOTU filed a suit against NATIONAL INSURANCE CORPORATION (hereinafter referred to as the defendant) on 21st August 1995 in an action for special damages arising from a breach of contract. Then on 9th March 1999 the plaintiff filed an amended plaint in which a claim was laid against the defendant and Uganda Cement Industry Ltd against whom the suit was later withdrawn. The claim against the two defendants had sought the following reliefs:-

(a) An order that an account be taken to ascertain the exact amounts paid the first defendant by both the plaintiff and his employees including the second defendant between 1968 and September 1987.

(b) In the alternative an order that an account be taken to ascertain the exact amount deducted by the 2nd defendant from the employee's salary for the period 1971 to 1987.

(c) An order that payment of the total sum due from the defendants to the plaintiff be paid forthwith in a sum reflecting the time value of said contributions by comparison with a parallel currency like the United States Dollar.

(d) Interest on the above from the date of filing the suit.

(e) General damages for breach of contract and inconvenience.

(f) Any other and such other relief as the Honourable court may deem fit.

The action against the defendants arose from the following facts pleaded and admitted at the commencement of the trial.

1. That between 1968 and 1987 the plaintiff was an employee of Jinja Municipal Council and Uganda Cement Industry Tororo.
2. Both employers had a retirement benefits scheme for their employees with the defendant.
3. In 1987 the Uganda Cement Industry terminated the plaintiff's services.
4. On 28.05.1996 the defendant passed on a sum of shs 13.403/= to Uganda Cement Industry as plaintiff's entitlement under the scheme which the plaintiff rejected.

The issues framed for trial are as follows:-

1) Whether the plaintiff has a case of action against the defendant under the scheme.
2) If the plaintiff has a cause of action against the defendant what is he entitled to under the scheme.
3) Remedies if any.

By the time the scheduling conference was conducted on 16.09.2008 the suit against the 2nd defendant had been withdrawn because according to Mr. Ebert Byenkya, counsel for the plaintiff, the second defendant was no longer in existence because it was sold off and all matters related to their employee's benefits handed over to the National Insurance Corporation. This gave rise to the first issue raised by Dr. Byamugisha counsel for the

defendant, who when explaining the defendant's case during the scheduling conference asserted that the plaintiff had no contract with the defendant and was not party to the insurance policy. This was the basis for the first issue raised in the trial.

In his submissions on this issue counsel for the plaintiff expressed surprise that it was ever framed as an issue because according to him there can be no doubt that the plaintiff and the defendant had a relationship under the retirement benefits scheme. He stated thus:-

> *"The defendant issued a certificate of membership to the plaintiff recognizing that fact (see Exhibit P 1). The plaintiff provided consideration by way of 5% of his earnings and even the 15% employer contribution was done by the employer on the plaintiff's behalf. In effect the employer was the plaintiff's agent for the purposes of remitting the remittances. The defendant's witness freely admits all the facts and admits also, that the payments of the plaintiff were of commercial benefit to the defendant ……..*
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> *The common law position on the right to sue under the contract is well settled. A right to sue is bestowed upon any person who supplies consideration under a contract to enforce obligations bestowed upon him by that contract. Consideration must flow from the promise. In this case Mr. Adotu was a promise entitled to duly supplied consideration. We refer this case to the famous case of Tweddle and Atkinson (except enclosed for this principle)."*

As far as the general principles relating to obligations under a contract are concerned the above statement is correct but as to whether or not they are applicable to this case is a

matter that will be resolved when the application of the Tweddle and Atkinson case has been fully discussed and in consideration of the circumstances of this case.

In reply to plaintiff's counsel's submissions Dr. Byamugisha, counsel for the defendant submitted that once the defendant had paid the Uganda Cement Industry a total sum of shs 23.655.500= including a sum of shs 13.403= paid on behalf of the plaintiff their obligations under the insurance scheme were discharged and the defendant owed nothing to the plaintiff.

In the original plaint only the current defendant had been sued. Then by a notice of motion filed in this court on 22.07.1996 the plaintiff sought orders of this court to join Uganda Cement Industry as a defendant. In support of the motion Mr. Oscar John Kihika of C/o Byenkya, Kihika & Co. Advocates swore an affidavit in which a letter addressed to the General Manager Uganda Cement Industry was annexed. In the 3rd paragraph of this letter it stated that *"there was no direct contract between our client and Natural Insurance Corporation. In addition to that National Insurance Corporation alleged that you did not pay premiums for the years 1982-1992. Accordingly the Insurance Company claims it is under no obligation to pay to our client the retirement benefit for that period."* The Uganda Cement Industry was joined as a party but on 16.09.2008 counsel for the plaintiff withdrew the suit against them. He informed court as follows:-

"We have a letter to the effect that the 2nd defendant was sold and all matters to do with benefits handed over to NIC." If the NIC had stated that they had discharged all their obligations under the scheme as far as the claim of the plaintiff is concerned his matter cannot have been one of those handed over to NIC to handle. The statement might have referred to those who still had running policies with the defendant. I have brought up this

issue to demonstrate that the status of the plaintiff as a policy holder under the scheme did not bestow upon him any rights under the contract beyond his own contribution.

The contract was executed between defendant and the plaintiff's employers who administered it according to the terms agreed between them. As an example he was supposed to make a contribution of 5% while his employer would make a contribution of 15%. I do not think that even if there was failure to make the contributions as was alleged the defendant would go directly to him and demand his contribution. Likewise he could not go directly to the defendant and claim for a breach because that direct link did not exist. If his policy was not properly managed including nonpayment of his contributions his remedy would lie with his employer who would be responsible for his recovery of his policy whether in form of surrender value or pension which would be paid to him by the employer and not directly by the defendant. The plaintiff's employers were the ones accountable to him for any query about what was paid on his behalf to the defendant. This is what the plaintiff sought when he prayed for an order that an account be taken to ascertain the exact amounts paid to the first defendant by both the plaintiff and his employers including the second defendant between 1968 and September 1987 and in the alternative an order that an account be taken to ascertain the exact amount deducted by the 2nd defendant from the employee's salary for the period 1971 to 1987.

The plaintiff should have sought these reliefs from the employer who would provide him with an accountability of the money they had recovered from his salary to make his contribution of 5% and their own contribution of 15%. The plaintiff's employers were also accountable to him for payment of his terminal benefits including pension if he was qualified for it. Following from the above discussion the answer to the first issue is that the plaintiff has no action against the defendant. He should have maintained the action against the 2nd defendant because even if the 2nd defendant had been sold the new owners

would take responsibility for any liability to the plaintiff whose account must have remained.

The above finding disposes of this case but in case the above finding is erroneous court wishes to make findings on the rest of the issues the second one of which was framed in the terms that *"if the plaintiff had a cause of action against the defendant what is he entitled to under the scheme."*

The plaintiff adduced testimony of what he claims he was entitled to by producing a certificate (Exh. P6) in which Abacus Associates, Certified Accountants attempted to lay a basis for regular pension payments. Unfortunately Okello Hebert (PW2) who was produced to explain the document could not do so because he was clearly not conversant with the principles on which the payments would be justified. He was not the author of the document and the author was not produced to explain it on the ground that he was unwilling to testify in court. In my view the unwillingness of a witness who had authored a document to attend court to not only produce the document but also explain it would not be sufficient reason for abandoning the most vital witness to explain the circumstances under which the plaintiff would be entitled to pension rather than the surrender value of the policy when in his own admission he had not reached a pensionable age. This single factor makes a distinction between policy holders who would be entitled to receive pension under the scheme and those who were not qualified to receive pension on the consideration that they were not in the pension bracket on account of age. In my view if a policy holder under the scheme had not reached retirement age the assumption would be that he would continue contributing to the scheme like the plaintiff had done when he left the services of Jinja Municipal Council and continued with his contributions when he joined Uganda Cement Corporation where if it was not for termination of his services he would contribute till reaching retirement

age when he would be entitled to pension. Short of that he was entitled to the surrender value of his policy under the scheme which was paid to him but rejected as being chicken feed.

One element that made the surrender value 'chicken feed' was the Currency Reform Statute which came into force on 15th May 1987 where S. 2 therein provided for removal of two zeroes. The statute provided that upon the coming into force of the statute every contract, sale, payment, bill, note, instrument or security for money or involving the payment of, or the liability to pay, any money which would have been made, executed, entered into, done or had in and in relations to the old currency shall be deemed to be made, executed, entered into, done or had in and in relation to the new currency at the conversion rate specified in sub Section (b) of Section 1 of this statute and b) all monetary obligations or transactions shall be deemed to be expressed and recorded and shall be settled in the new currency at the aforesaid conversion rate.

The coming into force of the Currency Reform Statute establishes a cutoff point between the pre-Currency Reform payments and the post currency reform payments however painful the effect of the reform may be. The plaintiff's payment was one of those falling in the post currency reform category which would mean that even the contributions he made in 1968 would be subject to reduction by two zeroes because of the Currency Reform Statute. The reduction was applied not only to the plaintiff but other beneficiaries under the scheme and to me that was the correct interpretation of the law and what was computed was what the plaintiffs was entitled to.

In the circumstances of this case and from the resolution of the issues this court finds no merit in the plaintiff's suit which is dismissed with costs to the defendant.

Eldad Mwangusya

J U D G E

01.02.2013