"REPORTABLE"

CASE NO.: I 1771/2004

SUMMARY

ANNALIZE OPPERMAN & TWO OTHERS versus **MUTUAL AND FEDERAL INSURANCE COMPANY NAMIBIA LTD**

DAMASEB, JP

17/08/2006

TACIT AGREEMENT: TEST TO BE APPLIED TO ESTABLISH PROOF OF

- Particulars of claim alleging express, alternatively tacit agreement between an employer and the deceased that latter was employed on same terms and conditions he enjoyed with the former employer since acquired by defendant. Employee having died, his widow and children seeking to enforce alleged agreement (*stipulatio alteri*).

- Test for establishing if tacit contract proved stated: 3 stage inquiry involved (para 74). Conduct of the parties must be clear, unequivocal and unambiguous pointing to existence of tacit contract. The test is an objective one.

- Court not satisfied conduct of parties so clear, unequivocal, unambiguous that inference can be drawn that they agreed to the terms alleged by the plaintiffs.

"REPORTABLE"

CASE NO.: I 1771/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ANNALIZE OPPERMAN	**1ST PLAINTIFF**
MAGDA OPPERMAN	**2ND PLAINTIFF**
DIVAN OPPERMAN	**3RD PLAINTIFF**

and

MUTUAL AND FEDERAL INSURANCE COMPANY NAMIBIA LTD	**DEFENDANT**

CORAM: **DAMASEB, JP**

Heard on: 11th – 14th/10/04; 27th – 30th/09/05; 15th – 18th /11/05

Delivered on: 17/08/2006

JUDGMENT

[1] **DAMASEB, JP:** This is a claim for damages by a widow and her two children (a son and a daughter) against the employer of the deceased husband and father who died of leukaemia on 20th March 2002. The deceased Pieter De Bois Opperman was before 1st November 2001 in the

employ of Fedsure General Insurance Namibia Ltd (FGI) as managing director.

Introduction

[2] It is common cause that with effect from 30th September 2001, Mutual and Federal Insurance Company Namibia Ltd (M&F), the defendant in these proceedings, acquired all the shares in FGI. Late Opperman was appointed managing director of the defendant on 1st November 2001. The defendant knew at the time of taking over FGI that late Opperman was suffering from cancer. The dispute in the present proceedings relates to on exactly what terms he was employed by M&F on the date of his death.

[3] The plaintiffs' case is that when late Opperman became managing director of M&F he did so on the same terms and conditions that he enjoyed with FGI in respect of death and pension benefits; benefits which, upon his death, devolved upon his surviving spouse and two children. The defendant does not deny that the plaintiffs became entitled to certain benefits upon late Opperman's death. It denies the benefits they are entitled to be those late Opperman enjoyed at FGI before his move-over to M&F. The defendant's case is that when late Opperman became an employee of M&F, he ceased enjoying FGI benefits and became entitled to M&F benefits and, therefore, the plaintiffs are entitled only to benefits of M&F employees and that these had been paid to the plaintiffs.

[4] The plaintiffs' particulars of claim (paragraph 10) allege, amongst others, that:

> "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."

[5] The plaintiffs also allege that the benefits Opperman enjoyed with FGI and did so when he moved over to M&F (and to which plaintiffs are now entitled), are the following:

"9.1 The total amount of both Opperman's and FGI's contribution to the said fund together with interest and bonuses accumulated;

9.2 An amount double Opperman's annual salary to be distributed among the plaintiffs in such proportions as the trustees of the said pension fund decided upon (Group Life cover);

9.3 First plaintiff … to a monthly payment equal to 50% of the salary of Opperman immediately prior to his death [as she did not] remarry prior to age 60… [First plaintiff not having remarried] prior to age 60 … the entitlement is to continue for the rest of her life; and

9.4 Second and third plaintiff … a monthly payment equal to 15% of the salary of Opperman immediately prior to his death for as long as they would have remained dependants of Opperman but for his death."

[6] The particulars of claim contain an alternative claim in *delict*, alleging that the defendant, when offering the position of managing director to late Opperman, in writing and orally represented to him that his employment with M&F would be on the same terms and conditions as those he had with FGI, but that the representation was false or negligent because the pension benefits under M&F's pension fund were less than those Opperman had under the FGI fund.

[7] At the outset of the trial the following were recorded by the Court at the request of the parties:

(i) that the paginated and indexed discovered documents will, as between the parties, be accepted at face value as the truth of what they convey, but that each party reserves the right to place their own interpretation thereon and to lead evidence in support of such interpretation;

(ii) that in terms of Rule 33(4), trial on *quantum* in respect of the alternative claim be separated from the trial on liability.

[8] The plaintiffs called four witnesses in support of their case: Mrs Annelize Opperman, the widow of late Opperman's; Johan Barnard, a former colleague of late Opperman's at both FGI and M&F and who also acted in late Opperman's position when the latter was undergoing treatment for cancer; Elmarie Kruger who was a colleague of late Opperman's and at some point his secretary, and Mariana Botes who was responsible for FGI finances before the take-over and also worked closely with Opperman. Of the four plaintiffs' witnesses only Mrs Opperman is not a former employee of FGI. Of the three former FGI employees only Barnard was no longer in the employee of the defendant when the evidence was led before me.

[9] The defendant called three witnesses all of whom are senior managers of M&F South Africa and who managed and directed the take-over of FGI and its personnel. On behalf of the defendant, none of the former FGI employees were called as witnesses to shed light on what was communicated to them and how they had perceived the process. This is crucial in view of the central issue in this case about what exactly was communicated to the former FGI employees during the take-over by M&F.

The conspectus

[10] It is common cause that late Opperman was employed by M&F effective November 2001. He received a letter of appointment from one Bruce Campbell on 10th October 2001 informing him that he will be provided with ‘’ *full details of your remuneration package and conditions of service in the near future*’’. It is common cause that when the take-over of FGI by M&F became known, late Opperman was concerned about, and discussed with Campbell, what would become of him in the new company. He suffered from cancer at the time, received treatment for that disease during the change-over, and eventually succumbed to cancer on 20th March 2002 whilst in the employ of the defendant and having refused to sign the contract presented to him by the defendant on 15 January 2002 to formalise the employment relationship.

[11] It is further common ground that the accumulated pension benefits of the former FGI employees, including late Opperman’s , had not been transferred to the retirement fund of the defendant at the time of late Opperman’s death. That transfer only took place in September 2002 after NAMFISA authorised it. It is also common cause that late Opperman although employed by the defendant from November 2001 only began to be paid by it from January 2002. Before that he received exactly the same pay and benefits as a FGI employee and from FGI. From January 2002 he began to be paid by M&F on their terms and the benefits were calculated and deducted on those terms. When Opperman began to be paid as an M&F employee effective January 2002, his take- home pay was less than what it was for the months of November and December 2001.

[12] It is common cause that late Opperman joined the defendant’s retirement fund on 1st January 2002. It is accepted by the defendant that had Opperman died before January 2002 the benefits payable on his death would have been FGI benefits.

[13] It is clear from the evidence of the former FGI employees that after the defendant acquired FGI senior managers of the defendant's parent company in South Africa visited Namibia to explain to FGI employees what was to become of them, amongst others. There is a dispute about what was said (or not said) but the evidence shows clearly that late Opperman and the two general managers were treated differently from the rest of the staff of FGI.

[14] The evidence also shows that late Opperman did not attend the road shows at which the senior managers from South Africa explained the change over process to FGI employees. The defendant's evidence is that it was at these road shows , in a toolkit and on the website that it was explained to former FGI employees that they would be transferred to the defendant on the latter's terms and conditions. It is common cause that if, when he died, late Opperman enjoyed (as M&F employee) the same benefits he had with FGI , his widow and surviving issue would have received greater benefits than was actually paid out to them. The plaintiffs' claim is aimed at recovering the difference the M&F pension and death benefits and those of FGI.

The evidence of the plaintiffs

[15] Mrs Annelize Opperman was born on 26th February 1953. She and her two children with late Opperman are the plaintiffs. The two children were born in 1980 and 1981 respectively. Mrs Opperman was married to late Opperman on 25th March 1987. Mrs Opperman never remarried after the death of her husband. The second plaintiff is studying for a LL.B degree and intends thereafter to pursue a doctorate. She was in full-time studies at the time of her father's death, while the third plaintiff had completed a BCom degree at the time of his father's death, but could not proceed to do an Honours degree because Mrs Opperman could not afford to pay for his studies. He had for that reason to take up employment to assist the first plaintiff.

[16] According to Mrs Opperman, after her husband's death one Mr Marius Low of M&F paid her a visit, following her inquiry about the benefits due to them on account of late Opperman's death. Low explained to her that the benefits due to them were not as much as she expected. She did not accept what Low told her because that was not how her late husband explained it to her – which was that he was being "taken over" by M&F with the same benefits he enjoyed with his previous employer, FGI.

[17] Mrs Opperman testified that the payment of the death claim to her and the children was only made 'quite some time' after late Opperman's death – a fact confirmed by letter dated 2nd October 2003 by the defendant to her enclosing a cheque of N$52 016.12 for outstanding interest. Mrs Opperman confirmed that all told, the following payments were made by the defendant to the plaintiffs as a result of the death of late Opperman:

Transfer value from FGI	N$1 095 947.27
Reinsured benefit from M&F Pension Fund	N$ 660 000.00
Employee & Employer contributions to M&F Pension Fund (an amount which includes interest earned On employer & employee contributions & on Transfer value from FGI)	N$ 31 089.16
Outstanding Interest	N$ 52 016.12
	N$1 839 052.55

but that she did not accept this as a 'final settlement' and resolved to take the matter further because her late husband had told her that she did not need to worry about anything as M&F would take him over from FGI with his FGI benefits. When asked why her husband discussed that with her, Mrs Opperman replied:

> "It was during the time that he was sick and I was really worried what will happen to us. And they informed us that he would be taken over on the same conditions so I will be looked well after."

[18] Mrs Opperman testified that her investigation showed that the benefits paid to them after late Opperman's death were not what they should be. In cross-examination Mrs Opperman was asked to explain how she understood it for her husband to move from FGI to M&F on the 'same conditions'. Her answer was as follows:

> "It means that my husband was transferred on the same benefits, which he was having at the first company, the whole benefits was the same."

She said, however, that she did not know what her husband's '*salary package'* was when he moved to M&F, except that her husband told her that it had increased to about N$7 000 since he moved to M&F from FGI. She did not know what the breakdown was though, but said that the increase was accounted for by the fact that M&F did not want to take over 'housing' and therefore paid him more '*so that he can cover the housing'*.

[19] Mrs Opperman was also unable to explain what her late husband's benefits were with either FGI or M&F and stated that her late husband had not told her, except that they were 'taken over as it was'. Counsel for the defendant then put to Mrs Opperman that it was made clear to her husband during the change-over that the total cost of his employment with M&F would be the same as it was with FGI, and that whenever anyone moves from one employer to another, including a change-over from one pension fund to another, the benefits under the two pension funds are never identical or the same. This was disputed by Mrs Opperman. She persisted that M&F assured late Opperman that he '*will not be worse off than he was*.'

[20] Mrs Opperman confirmed that her late husband was employed by M&F from 1st November 2001, but said she did not know under which medical aid scheme he was treated when he fell ill with cancer during the change-over.

She agreed though that the husband's change-over to the medical aid scheme of M&F was from 1st January 2002. Mrs Opperman also confirmed she was aware that her late husband had moved over from the FGI pension fund to the M&F pension but did not know when exactly *that* happened. She however reiterated her version that the move-over was to be on the same terms late Opperman enjoyed with FGI.

[21] Mr Sceales on behalf of the defendant referred Mrs Opperman to a '*salary conversion calculation'* in respect of her late husband prepared by the defendant some time during the change-over. This conversion purports to be the constituent parts of late Opperman's benefits with both FGI and M&F - showing his *total cost to company* with FGI and M&F as N$830 376.84, excluding monthly salary which is shown as N$69 198.07. Based on that, Mr Sceales put to Mrs Opperman that what her husband must have said to her was that the total cost of '*his package would be the same when he moved over to M&F.'* Her reply was that it was very technical and that she would not admit or deny it.

[22] Johan Barnard was FGI branch manager for Windhoek at the time of the change-over. He testified that the staff of FGI were only consulted after M&F had acquired FGI. According to Barnard, the most senior FGI employees, being late Opperman, one Mr Katjimune and he, were invited to become managing director and general managers respectively in M&F, while the rest of the staff were asked to apply for positions in M&F. The three of them accepted the invitation. Barnard says he was closely involved with the placing of the staff on the new organogram of the merged entity. In his case, Barnard testified, he understood that he was transferred to M&F on '*more or less the same terms'* he enjoyed at FGI, and that he and M&F *'would discuss (negotiate) the differences later on.'* Barnard was also a trustee of the old FGI pension fund, but was not involved in the discussion transferring FGI employees from the FGI pension fund to the M&F pension fund. He was

therefore unable to tell on what terms, as far as pension benefits go, he was transferred. He assumed he was transferred on '*more or less'* the same terms. He said he noticed the first problem with the terms and conditions of the move-over after late Opperman died, when he and one Botes (another witness for the plaintiffs) were invited to a meeting of trustees. There they '*discovered that there was major differences between the pension fund of FGI … and M&F.'* (sic)

[23] Barnard could not tell whether, by the time Opperman died, the employees' pension fund benefits had been transferred from FGI pension fund to the M&F pension fund. Barnard testified that late Opperman had told him at the time of the move-over that the *'benefits would be the same as that we had and more specifically the salaries.'*

When asked whether that was in fact done, Barnard testified:

> "Apparently it was done, but the problem is with the calculation of the taxes … that the bottom line salaries was far less than what we got with the FGI, in other words what I got, or what we got to take home at the end of the month was less than what we actually had with FGI."

This matter was, to his knowledge, taken up with one Mr Appleby of the defendant in Johannesburg.

[24] In cross-examination Barnard confirmed that the effective date of their integration into M&F was 1st January 2002. It was put to Barnard, and he agreed, that the negotiations between Investec and M&F started around October/November 2001, and that in terms of an appointment letter to that effect, late Opperman was appointed with effect from 1st November 2001, but that *'the two companies continued operating separately until the 1st of January … when the integration process was effected.'* Barnard testified that

he never personally got an M&F appointment letter. The first time he had a problem with his own terms was when he got his first pay which was *'fairly different in the cash value.'* He testified that he queried it until he left the company. The gist of this difference, as explained by Barnard, was that his taxable pay with M&F was now much bigger because benefits were added on to basic pay and therefore enlarged the taxable income as a result of which take-home pay was less. He said that he never accepted the new terms with M&F until he left the company in May 2002.

[25] Barnard's attention was drawn, inviting his comment, to the unsigned employment contract between M&F and late Opperman which, amongst others, provided that late Opperman would report to one Appleby for guidance; that he was required to join the M&F pension fund and that M&F would contribute 10.5% of his retirement funding income; and that he was required to join the M&F medical aid scheme. Barnard testified that he did not know if those were the terms on which late Opperman joined M&F, but when put to him that those were the same terms on which he (Barnard) joined M&F, said that he did not sign the contract presented to him incorporating those terms because he did not agree with them. Barnard accepted that, according to the salary conversion calculation applicable to him, the benefits package offered to him by M&F was the same 'cost to company' as that at FGI, but said the difference lay in the way the computation was done which, in the case of M&F, resulted in a take-home pay less than he enjoyed with FGI. He also accepted, from his experience in the industry for 16 years, that when a person moves from one pension fund to another benefits will generally not be exactly the same. He said though that in the case of the change-over from FGI to M&F it was not *'by choice but by acquisition'*. Barnard testified that late Opperman did not discuss the details of his (late Opperman's) contract with him but was *'a bit unhappy about his salary and his package.'* In re-examination Barnard testified that he did not know if late Opperman signed his contract of employment. He

and Opperman were however busy negotiating the terms of their take-over and he (Barnard) understood that prior to him finalising his package, he enjoyed the same terms and conditions he had with FGI.

[26] The next witness was Ms Elmarie Kruger, still in the employ of M&F. Kruger was also affected by the change-over from FGI to M&F. She testified that on two occasions after the take over of FGI they were called over to M&F offices where the take-over (or merger) was explained and they were told to *'operate as normal until further notice.'* She had to complete a 'preference form' for a position in M&F as part of the change-over, and placements were guaranteed all of them. Kruger testified that she was present at a presentation done by one Mr Bruce Campbell (a defence witness) on 15th October 2001 concerning the change-over and she confirmed the contents of a minute kept of that presentation.

[27] The minute is cast in Question and Answer format and, amongst others, records the following:

> "Q (M Reid) What will happen to the Medical Aid Fund?
>
> A Too soon to say, will need to look at both and decide the best way forward. Staff interest would be secured as far a possible. It could make sense to combine the M & F and FGI funds, because the larger the participation the easier to maintain benefits.
>
> Q (M Reid) same question for Pension Fund.
>
> A Same answer."

The minute also records the following:

> "Q (F Bolgar) Will leave arrangements for staff be cancelled or affected?

A Probably not at this stage. Business as usual will prevail and no doubt both FGI and M&F will continue to operate separately until many integration issues have been considered.

Q (A de Koch) How long will the integration process take?

A Will be done as quickly as possible, but impossible to comment now. All staff will be invited and spoken to by a team who will advise of the process and answer any questions. Staff will also be kept updated with regular communications." (emphasis is mine)

[28] Kruger did not remember when the change-over of the pension fund was completed but said it was an issue that needed to be '*sorted out later*' and was only sorted out in the latter part of 2002. She also confirmed that she signed the letter to all FGI employees dated 8th April 2002 (hereafter the Kruger letter of 8th April 2002) informing them that their pension benefits would be transferred to the M&F Retirement Fund.(By then late Opperman was dead, of course.) That letter specifically states:

"08 April 2002

Dear Members

We herewith confirm that as a result of your employment in Mutual & Federal Insurance Company of Namibia Limited, the full accumulated value attributable to you in terms of the Rules of the FGI Namibia Staff Pension Scheme will be transferred to the Mutual & Federal Namibia Retirement Fund.

The trustees of both the FGI Namibia Staff Pension Scheme and the Mutual & Federal Namibia Retirement have consented in principal to this transfer and will confirm such a transfer once all the statutory documentation has been agreed to.

Once the transfer has been finalized, you will be provided with a benefit statement, which will confirm the value that has been transferred and it will also provide you with all information necessary to ensure that your information needs are met.

If you have any questions, you are welcome to contact either of the following officials:

… "

[29] Kruger testified that as at the date she wrote this letter, the pension fund benefits had not been transferred and her understanding was that her benefits, at that stage, were those under the FGI pension fund. According to Kruger, the statements indicating the cash and transfer values were only provided to staff of FGI after this letter. She also confirmed that it was only

on 27th August 2002, after late Opperman's death, that NAMFISA[1] gave the greenlight for the transfer of the FGI pension fund to the M&F fund.

[30] Kruger testified that when late Opperman received the proposed contract of employment with M&F, he *'said that he was not going to sign it and ... threw it at his desk.'* She was not aware whether he had subsequent discussions about the document with the *'people of Johannesburg.'*

[31] Kruger confirmed that the change-over required that all former FGI employees join the M&F pension fund and that *she* did so when she signed a new contract with M&F. The same applied to the medical aid scheme. Her attention was drawn to a Q & A slide show presented to employees at the time which, among others, said:

> "Benefits
>
> M&F benefits and conditions of employment will be applied in the new organisation as per staff manual. Copies of the staff manual will be provided to FGI staff."

Kruger said she never saw such a staff manual and she had no recollection of the particular slide. She conceded that she was not particularly concerned about the new benefits *regime*. She was more pre-occupied with keeping her job. In her new position at M&F she got the same salary and said she expected her pension benefits with M&F to be the same as those she enjoyed at FGI. She added: *"They said nothing was going to change, we can relax, everything is going to be the same ..."* Kruger testified that when the detailed statements of pension benefits were issued (well after Opperman's death) she noticed slight changes in the new pension benefits under the M&F fund and said under the M&F scheme the benefits were less.

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[1]Namibia Financial Institutions Supervisory Authority, created by Act 3 of 2001. The certificate authorizing the transfer was issued i.t.o s14(1) of the Pension Funds Act, 24 of 1956.

[32] The next witness was Ms Mariane Botes. She was the finance manager with FGI and dealt with salaries, medical aid and the pension fund. She was also involved in and affected by the change-over from FGI to M&F, and eventually moved over to M&F.

[33] With the change-over Botes was re-employed as finance manager of M&F. Botes confirmed the presentation done to staff by Campbell (the road show) and stated that her understanding of the change-over was that their *'situation will be exactly the same as it was when we were working for FGI.'* Bote's attention was drawn to a letter written by late Opperman on 26th February 2002, for the attention of Appleby and Ms Patience, with the caption: *"Concerns about current and previous matter related to former FGI Namibia."* In paragraph 6 of that letter late Opperman wrote:

> "The initial agreement was that the net remuneration of each employee of former FGI will be the same as from FGI. After revaluation of rentals of the Company Houses, Four employees' Nett income has now been reduced to a lower compensation (Tax, housing, subsidy etc.) We would appreciate if this could be resolved by Thursday, 28th February 2002."

Botes testified that the four people referred to included late Opperman.

[34] Botes did not know if late Opperman ever discussed his concerns with the defendant. Her attention was drawn to a letter dated 5th March 2002 by Henry Appleby, in which late Opperman was informed that in connection with the concern raised in his letter of 26th February 2002, Pieter Bezuidenhoudt would be '*responding in detail shortly'*. Botes said she was aware of the meeting that took place in Johannesburg before Appleby's letter of 5th March 2002, at the offices of M&F between late Opperman and Marius Low. It was put to her that Appleby then wrote a letter to late Opperman on 7th March 2002 in respect of the net pay concern raised by him as follows:

> "Gross Remuneration v Net Remuneration
>
> Because of **the different basis of pension fund, company contribution** and other issues affecting the difference between gross and net pay it was anticipated that all staff would experience a change in net pay. An accurate reconciliation of gross pay from the FGI to the M&F system was done for every employee to ensure that at this level the cost to company was exactly the same. It is regrettable that the expectation has been raised that the net remuneration will be unchanged because that is clearly a gross inaccuracy. This point was very clearly addressed at the time of presentations to staff and I am surprised that there are any staff that are under this misconception. Could you please set the record straight?" (emphasis supplied)

[35] Botes confirmed that late Opperman never signed his contract of employment. Botes testified that at the time of the Kruger letter of 8th April 2002, the benefits they thought they had were those of FGI. She said that it was only about August or September 2002, when a road-show on M&F benefits was done, that she learnt that the FGI benefits did not apply. Botes' attention was also drawn to a resolution of a meeting of the board of trustees of FGI pension scheme held on 25th March 2002 in Windhoek in which the following is recorded:

> "It is herby confirmed that, in terms of the Rules of the Fedsure Namibia Staff Pension Scheme, Mrs Annelize Opperman was appointed as the beneficiary to the benefits arising under this Scheme from the death of Mr Pieter De Bois Opperman. It is hereby resolved that the said benefits may be paid to Mrs Opperman." (my underlining for emphasis).

[36] Through Botes, Mr Frank for the plaintiffs established that the transfer of benefits of employees from FGI to M&F funds was completed on 12th August 2002. Botes added that she was 'definitely' not properly informed of the effect of the transfer from FGI pension scheme to M&F's. She also testified that they (FGI employees) were only apprised of the change-over of the pension benefits after the first meeting of the trustees which was after the death of Opperman.

Botes confirmed that as at 3rd September 2002, *'whenever a person that was previously in the service of FGI resigns during that period and up until the transfer actually took place the benefit was paid out of the FGI Fund.'*

[37] Botes confirmed that she was a trustee of the FGI pension fund and could thus confirm that the plaintiffs were entitled to the benefits set out in the particulars of claim if the FGI pension and death benefits applied.

[38] Mr Sceales, for the defendant, established the following from Botes in cross-examination: that two things were covered within the pension fund scheme: a death benefit in terms of an insurance benefit, and a pension benefit: the death benefit was covered by an insurance policy underwritten by Old Mutual from 1st January. Before that, a similar death benefit policy was underwritten by Fedsure South Africa. Therefore, from 1st January the premiums in respect of that life cover for the employees of FGI came to an end and the policy became paid up. When put to her that the benefits under the policy came to an end, Botes insisted that according to them (presumably the FGI staff) they were still part of the fund, although she accepted that when premiums are stopped benefits under the scheme also stop.

[39] Botes agreed that late Opperman's letter of 26th February 2006 made no mention of pension fund benefits and that his concern in the letter was about net pay. She also agreed that, to her knowledge, in no other correspondence had late Opperman complained about the change in pension fund benefits. Botes insisted though that they had at all times laboured under the impression that their pension fund and medical aid benefits would stay the same.

[40] Botes confirmed that during the road show it was explained that with the change-over they would all join the M&F pension fund on M&F fund

benefits. The same went for the medical aid scheme. She also confirmed that already in February 2001 she was aware, because of a letter to that effect by Price Waterhouse, that pension fund contributions under M&F differed from the FGI pension fund contributions. This letter also made clear that as far as the group life cover was concerned it was a different policy with different premiums. She said though that since she did not do any investigation she assumed the benefits under the new policy would be the same as under the old. She said what the benefits would be was never mentioned to them. Botes said she was not aware of any document which informed them (her) that the death benefits and the pension fund benefits would be exactly the same under the two funds.

[41] That concluded the case for the plaintiffs. An application for absolution from the instance was then launched. I refused it for reasons which will become apparent from this judgment. On resumption, the case for the defence was led by Mr Franklin, SC. The first defence witness was Mr Bruce Campbell, CEO of M&F South Africa.

The defence evidence

[42] Campbell testified that the reason for the defendant acquiring FGI Namibia was to integrate it into M&F. After the acquisition of FGI, the intention was for late Opperman to become managing director of M&F (Namibia) as he was considered the most suitable person for the job. Campbell testified that he first met late Opperman on 20th July 2001 in Cape Town at Investec offices, while Opperman was under recuperation from leukaemia. The two were introduced by Mr Greg Frury of Investec. Frury was looking for a buyer for FGI. At the meeting, according to Campbell, late Opperman had certain concerns he wished to raise. First, he wanted to know if after the acquisition there would be whole-scale retrenchments. Late Opperman was also concerned about his position in the company – a matter

in respect of which Campbell could not make any undertaking as the sale of shares agreement had not then been concluded. The other concern was about salary.

[43] Based on the experience of previous mergers, Campbell testified, he assured late Opperman that it would be inappropriate for him to be paid less in Namibia dollar terms than what he was paid by FGI. Campbell testified that he also told late Opperman that he would have to move over to M&F on the latter's terms and conditions as that would be a *'typical transfer in terms of an acquisition of this type.'* His terms were to be re-aligned to those of M&F: for example, FGI offered share options while M&F paid a performance bonus which would now be reflected in late Opperman's salary. Campbell testified that he did not discuss any pension benefits with late Opperman as he had no authority to do so. He added that at the time of the meeting he was not even aware of what the differences were between the pension and medical aid funds of M&F and FGI. The requirement though was that the move-over to M&F would involve joining the purchasing company's medical aid scheme and pension fund.

[44] Campbell denied concluding any agreement as alleged in paragraph 10 of the particulars of claim, i.e. that late Opperman took up employment with M&F in terms of an express, alternatively tacit agreement entitling him to the same terms and conditions of employment as those he enjoyed with FGI, including the same pension and death benefits. Campbell testified that not only did he not enter into such agreement but that he had no authority to as the pension fund and medical aid fund are separate legal entities and that as employer they had no authority to bind those entities' trustees. He also denied that the defendant was contractually obliged to make up the difference in the benefits between the FGI pension scheme and that of the defendant. According to Campbell, late Opperman became a member of the M&F pension scheme when he joined the employ of M&F. (On the evidence that would be on 1st November 2001).

[45] Campbell confirmed that he signed the appointment letter of late Opperman dated 10th October 2001. He also confirmed that late Opperman and the two general managers were confirmed in their positions well before the rest of the employees whose appointments took effect on 1st January 2002. This was done to remove uncertainty about who was going to lead the company. As at the end of September 2001, according to Campbell, the entire cost of running the business of FGI was taken over by M&F. The concomitant was that late Opperman ran the Namibian operations of both FGI and M&F from that date, Barnard reporting to him in respect of FGI and Katjimune in respect of M&F. FGI continued to receive premiums to pay claims. Campbell testified that he was not certain if Opperman attended the meetings where he briefed the FGI staff about the implications of the change-over.

[46] According to Campbell, the transfer of late Opperman from FGI to M&F represented the same cost to M&F as it did for FGI in so far as his salary package was concerned, albeit that the components making up the package, e.g. pension contributions, were not the same. Late Opperman had a choice as to how his package would ultimately be made up to maximise tax advantages. Based on his letter of 15th January 2002 to late Opperman, Campbell maintained that as at that date, Opperman was informed that he was required to join the pension scheme of M&F and that the company would contribute 50% of retirement funding income to the fund – confirming, he testified, what he told Opperman when the two met for the first time in Cape Town. According to Campbell, at no stage did late Opperman raise any complaint about the package in meetings with him. He made specific reference to a meeting of the board of directors of the defendant held in Windhoek on 18th February 2002, also attended by Opperman and Campbell, where late Opperman's appointment as managing director of M&F was confirmed, adding that late Opperman did not raise any dissatisfaction about

his employment at the meeting. As regards the employment contract offered to late Opperman, Campbell testified that he was not aware late Opperman never signed it.

[47] In cross-examination, Campbell confirmed that when he met with late Opperman in July 2001 in Cape Town, the issue of pension fund membership of a new fund was *not* discussed. As regards Campbell's evidence that late Opperman had the opportunity to raise the issue at subsequent meetings, the suggestion was put to Campbell by Mr Frank that late Opperman may not have felt the necessity to do so as he had been told previously by Campbell he would not be worse off than he was with FGI. Campbell retorted that late Opperman must have known that moving into a new company *'you cannot just change pension benefits for an individual.'*

[48] Mr Frank asked Campbell if the answer he gave during the road show when the issue was raised about the pension fund was a qualified statement with the potential of leaving staff with the impression the issue was not yet decided and was still being looked into. Campbell's rather evasive answer was the following:

> "... the issues around the Pension Fund ... are constantly under revision, for example in terms of the Pension Fund do you go on the flexible investment choice or do you stay with the current fund ... so it's a constant revision ... and that's what the reference is."

[49] Campbell sought to suggest in cross-examination that the minute in respect of the answer he gave given to the question of the status of the pension fund during the road show, was not properly recorded. (That much was never suggested to the plaintiff's witnesses in cross-examination when they testified and I reject his version on that issue in preference to the plaintiff's.) Campbell maintained, in effect, that the offer made to late

Opperman in the 15th of January 2002 letter was not subject to negotiation and he was, at best, non-committal in respect of Mr Frank's suggestion that late Opperman was entitled to refuse to accept terms which he was not happy with and that a labour dispute would then have arisen.

[50] Campbell's evidence was that he had no involvement with the transfer of the Pension Fund surpluses, but denied the suggestion that the issue of pension funds was 'neglected' during the change-over process. Campbell offered no comment on Mr Frank's suggestion that the Kruger letter of 8th April 2002 was the first letter to inform members being transferred from FGI to M&F about their pension benefits. He accepted though that the letter of appointment offered to late Opperman pre-dated the Kruger letter of 8 April 2001.

[51] Campbell was asked, considering that the evidence is that late Opperman was appointed in November 2001 while his M&F terms came into force on 1st January 2002, on what employment terms Opperman worked for the months of November and December 2001. The answer was that late Opperman came onto M&F terms and conditions on 1st November 2001. (This notwithstanding that for those months late Opperman was paid on FGI terms of old.) When that anomaly was put to him, Campbell answered:

> "But My Lord it's a question of timing he was still on the computer system of FGI and that's what generates his payslips."

He later said that the question would be best answered by other witnesses of the HR department of the defendant.

[52] In conclusion Mr Frank put it to Campbell that:

> "… Opperman because of the fact that he was paid in November and December [2001] … after he started with M&F on exactly the same basis as he was paid prior to that date by FGI [assumed those were] his terms and conditions of employment and there was no basis that [M&F] could change it unilaterally, which was what you intended to do by your letter of the 15th of January the next year?"

Campbell's answer was to the following effect: Opperman knew his appointment was intended to 'appease' the market and he was himself anxious to know where he would fit in the hierarchy. He knew too that he would move over on M&F terms and conditions and that his take-home pay would be no less. He also knew that the FGI and M&F merger would not take place overnight and that the remuneration had to be structured and that that would take place on 1st January 2002 and would have accepted that his payslip would come through FGI and that M&F would reimburse those costs; and that he also knew he would fall in line with the rest of the staff from 1st January 2002. (It is not clear to me on what basis late Opperman knew all this. The evidence does not show he was told so in terms.)

[53] In re-examination Campbell said that pursuant to his discussions with late Opperman it was never intended that he would remain a member of FGI pension fund, although in the employ of M&F late Opperman only remained a member of the FGI fund for the months of November & December 2001 for the *"practical considerations of moving a body of staff from one pension fund and one set of employment conditions to another which … needed … two months or whatever."*

[54] The next defence witness was Mr Marius Low, Group Human Resources Manager of M&F Insurance Company Ltd, the holding company of the defendant. He held that position in 2001 and 2002 when M&F took over FGI. As such manager he was responsible for the 'smooth' integration of staff from FGI to M&F - a process, he said, which started in October 2001. Low presented the road shows to the staff in Namibia – one in Windhoek and the

other in Walvis Bay. He said he was involved in two previous take-overs in South Africa and that they followed the same *modus operandi* there as with the present, except in the present voluntary retrenchment and early retirement were not offered to staff as options. Low testified that all staff were given a tool kit explaining how the process of integration was going to take place and that late Opperman's copy was handed to Barnard.

[55] Low testified that in relation to terms and conditions of employment, he conveyed to the people who attended the road shows that M&F terms and conditions would apply within the new structure with effect from 1st January 2002, as per the M&F staff manual which was subsequently published on the M&F Intranet which FGI staff had access to. To those who attended the road show, he explained that they would all become members of the M&F pension fund with effect from 1st January 2002, explaining to them that it was a defined contribution pension fund, comprising the risk benefits of life cover. He says he did not go into the details of the pension fund as the responsibility for educating members thereon was that of the board of trustees of the pension fund. He said staff were under no confusion as to what would happen about their pension fund membership, and that Barnard said after the presentation that he would arrange for a representative of Old Mutual to do a presentation to all FGI staff *'to make sure that those benefits that would not have been available anymore, like disability and death cover, that provision is made by the individual members for such cover.'*[2] Low conceded late Opperman was never at any of the road shows.

[56] As far as salary goes, Low testified, the FGI staff were told they would be taken over on 'total *cost to company'* basis. He explained what that involved: It is clear from what he explained that the accent lies on the bottom line as far as M&F was concerned ; in that what mattered was that the total cost to M&F of taking over an employee should not be more than

[2]This was of course never put to Barnard in cross-examination.

what that cost was to FGI. How that affected the various elements of the employees' salary package was not the greatest concern to M&F, it seemed to me. According to Low M&F would assume responsibility for the gross package and the employee was left to structure the package themselves. As he put it:

> "That's at their option, whether to take such benefits (e.g. car allowance, cell-phone, etc.), if they don't; then their basic pay will be higher, if they do, then that difference will be reflected in the allowance."

[57] Low testified that as from 1st January 2002 all those who had been members of the FGI pension fund became members of the defendant's pension fund, including late Opperman. Low explained that a steering committee overseeing the reintegration had decided that all staff would move over from FGI to M&F effective 1st January 2002 and *that* explained the fact that late Opperman and Barnard were paid from FGI for the months of November & December and that it would not have been fair to treat them differently from the other staff.

[58] Low testified that the only complaint ever raised by late Opperman with Low about himself, was the fact that he had to pay a market-related rental on the company house he was living in at the time: with FGI he paid nominal rent on it. Low denied that net income was ever guaranteed to late Opperman as suggested in his letter of 26th February 2002, saying:

> "My view is that nobody at M&F will ever guarantee net remuneration because there are too many elements that affect deductions: the quantum of insurance, for instance that's paid in the company … so net income would certainly not have been guaranteed."

[59] Low testified that although a resolution of the board of trustees of the Fedsure pension fund, agreed to by Mutual & Federal, was passed authorising

payment to Mrs Opperman the accumulated credit in that pension fund, the benefits to Mrs Opperman were eventually paid "*via the M&F Fund*" after it was first transferred into the M&F fund.

[60] In cross-examination Low testified he did not know, first, why the accumulated benefit in Fedsure had first to be transferred to M&F fund and, second, why it took so long to be paid out to the beneficiaries. Low testified that the distribution which eventually took place could only have been based on the Group Life cover held by late Opperman with M&F whose board of trustees decided on the distribution of the benefits to the plaintiffs.

[61] It was clear from the answers he gave in cross-examination that Low did not know (and had no direct or personal knowledge) that late Opperman knew that he was being transferred to M&F on the terms of M&F. All he really based his knowledge and belief that Opperman did know was the fact, he said, he gave a toolkit to Barnard to give to Opperman. (Apart from there being no explanation at all why he gave the kit to Barnard and not to late Opperman personally, this suggestion was never put to Barnard in cross-examination. In any event, why a matter of such great importance as a person's pension benefits would be treated in such a cavalier fashion is inexplicable and beyond me.)

[62] Low testified that if Opperman died in December 2001, the benefits which would have been payable upon his death would have been FGI benefits because that is where his contributions were made and the premium for the life cover was paid. He said that 'in principle on paper' the FGI fund was more generous in respect of people who died in employment, compared to M&F benefits although, he said, the exclusions did not make it all that generous. (It is curious then that the plaintiffs' claim is being defended if there is no difference in the benefits.) Low disputed that the Kruger letter of 8th April 2002 was the first time employees were told their benefits would be

transferred to the M&F fund. He said the information was contained in the tool kit. Low confirmed he was aware late Opperman never signed the employment contract offered to him.

[63] The next witness for the defendant was Peter Bezuidenhoudt, the chief financial officer of M&F. He held that position in 2002. Low reported to him. He was involved in the staff move-over from FGI to M&F. He said that the former FGI employees moved over to the M&F pension fund on 1st January 2002. He confirmed that Opperman was appointed managing director of defendant on 1st November 2001. Bezuidenhout was responsible for editing and finalising the contract of employment offered to Opperman (15 January 2002) and he approved the terms contained therein which, according to him, are standard M&F terms.

[64] Bezuidenhoudt testified that he had met late Opperman only once after the letter of engagement was sent to late Opperman. That was in February 2002. Their meeting was restricted to HR and finance issues. He referred to issues he discussed with late Opperman; one of which was how former FGI employees' termination benefits would be made non-taxable: Opperman taking the view that the way M&F process '*salaries was not aggressive enough relative to the types of facilities or options that are available under Namibian tax law.'* Bezuidenhoudt said he undertook to late Opperman to investigate the matter as he did not know Namibian tax law. He testified that Price Water Coopers was appointed to investigate the matter. They did so, but defendant did not implement a lot of their recommendations. The other issue was that Opperman said to him that he did not intend to go for a medical check-up as required by the M&F Pension Fund and Medical Aid Fund because of his pre-existing medical condition.

[65] Bezuidenhoudt testified that when he spoke to late Opperman in February 2002, the latter knew he was an employee of M&F on M&F terms

and conditions. He testified that late Opperman did not raise any difficulties about his employment. They never discussed the employment contract and he was not aware Opperman never signed it. He assumed that late Opperman joined M&F on FGI conditions, including death benefits payable on his death. He also denied the defendant was contractually obliged to make up the difference between Opperman's FGI benefits and those of M&F. He also denied the suggestion in Opperman's letter of 26th February 2002 that net remuneration of the four former FGI employees would remain the same. He said only a *fool* would have made such an undertaking. He said that the conditions of membership of the medical aid scheme and the taxation regime followed by M&F would necessitate that net pay would not remain the same in any event; implying that for that reason he could not have made such an undertaking.

[66] In cross-examination, Bezuidenhoudt said he did not know what was discussed between Campbell and late Opperman. He said he never did the presentations to staff in Windhoek but that he prepared the content thereof. He therefore bore no knowledge of what was said in Windhoek to the staff of FGI. Bezuidenhoudt, although invited to, could not give a satisfactory explanation for why no-one in M&F ever followed up to see whether or not, and if so why, late Opperman did not sign the contract of employment that was offered to him. He conceded that the letter of 26th February 2002 from late Opperman was after the meeting he (Bezuidenhoudt) said he had with late Opperman where the issues he now mentioned were discussed.

Claims abandoned

[67] Both counsel submitted helpful heads of argument and I am grateful to them for their industry. Both in his heads and in oral argument, Mr Frank did not deal at all with the alternative claim and this prompted Mr Franklin, for the defendant, to comment that the alternative claim is no longer a live

issue. Mr Franklin did therefore not address me on the alternative claim. Mr Frank in reply confirmed that the alternative claim in delict is not being pursued. Mr Frank also confirmed that the plaintiffs do not pursue the claim in respect of interest.

Defining the issue for decision

[68] I must now consider if the plaintiffs have proved their main claim on balance of probabilities; in other words: is it more probable than not that late Opperman was appointed by the defendant as managing director of M&F on the same terms and conditions he enjoyed as an employee of FGI, including death and pension benefits?

Findings of fact

[69] Mr Frank submitted that an agreement on the terms alleged is discernable from the letter of appointment of 10 October 2002, the fact late Opperman was paid on FGI terms for the months of November and December 2001; and the confirmation by Low that for those two months late Opperman enjoyed FGI pension benefits. I do not find on the facts evidence of an express agreement between the defendant and late Opperman that the latter was employed by the defendant on the same terms and conditions he enjoyed with FGI.

[70] That Mrs Opperman and the deceased were concerned about the children's and her welfare once Opperman passed has not been disputed. That leads me to the inference that they felt that if he died enjoying the same benefits he had with FGI, the family's financial security would be assured. The defendant has accepted, or at the very least it does not dispute, that the deceased discussed with first plaintiff the terms of his change-over from FGI to M&F. The Plaintiffs' version is that the deceased told

Mrs Opperman that his change-over would be on the same terms and conditions (benefits) he had with FGI. The plaintiffs bear the *onus*, not only that that is what was said, but that it is what was actually agreed.

[71] The defendant says what the deceased said, or meant, was that his '*cost to company'* will be the same. This implies, yet again, that the defendants accept that late Opperman did discuss the terms of his change-over with Mrs Opperman. Once that is accepted (and keeping at the back of the mind the fact that they were both concerned about the welfare of the family once he passes) what is the probability that he would say to her that *his cost to company* will remain the same, instead of that she need not worry because he would move to the new employer on the same terms that he enjoyed with the current employer? I find that it is more probable than not that he conveyed to the first plaintiff what he considered to be more favourable to the family than that which was an uncertainty at that point in time , i.e. that his '*cost to company'* will remain the same. I am fortified in this conclusion by the reaction of Mrs Opperman immediately she learnt of what was to be paid out to them. She said, and this has not been denied or disproved, that the benefits being paid out to them is not what her husband said they would be. I reject the defendant's version that late Opperman said to his wife that his cost to company will be the same to the new employer. I find, instead, that it is more probable than not that he said to her that he would move over to M&F on the same terms and conditions that he enjoyed at FGI.

[72] The question I must still answer is: was w*hat* late Opperman told the first plaintiff what was actually agreed with the defendant? Either there was an express agreement to that effect, or such agreement came into effect through the conduct of the parties. I already found no evidence of an express agreement.

The test for finding a tacit contract

[73] In the words of Wessels JA in *Bremer Meulens (Edms) Bpk v Floros* 1966PH A36 (A):

> "In so far as the essentials are concerned there is no difference between express and tacit agreements. Indeed the only difference lies in the method of proof, the former being proved either by evidence of the verbal declarations of the parties or the production of the written instrument embodying their agreement, the latter by inference from the conduct of the parties.''

[74] As Christie observes (*The Law of Contract in South Africa* 3rd edn at 89-90), there are two conflicting tests adopted by the Appellate Division[3] in South Africa for determining whether or not a tacit contract has been proved. I am not aware of any decided case in Namibia resolving the issue authoritatively. After attempting to reconcile the conflicting authorities (at 90 – 91), Christie goes on to suggest a formula for how a court must approach the issue. I am in respectful agreement with that formula and do adopt it in the present case. He says (at 90 -91):

> "...in deciding whether a tacit contract ...has been proved the court is undertaking an inquiry that involves three stages...the first stage is to decide , on the preponderance of probabilities , what facts have been established . The second... stage is to decide, also on the preponderance of probabilities, what conclusion consistent with those facts is most likely to be correct. [The intermediate stage between these two] ...is to decide how the proved facts, that is, the conduct of each party and the surrounding circumstances, must have been interpreted by the other. The word '' must '' is used advisedly , because at this intermediate stage of the inquiry

[3] **Bank of South Africa Ltd v Ocean Commodities Inc.** 1983 (I) SA 276 (A) at 292 A-B where it is said:

> *"In order to establish a tacit contract it is necessary to show**, by a preponderance of probabilities**, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem,"*

And **Joel Melamed and Hurwirtz v Cleveland Estates (Pty) Ltd** 1984 (3) SA 155 (A) at 165 B, where it is said:

> *"In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that **the most plausible probable conclusion** from all the relevant proved facts and circumstances is that a contract came into existence."*(My emphasis)

> the court is not concerned with the resolution of an issue of fact , but with the subjective effect of the parties' conduct and the surrounding circumstances on the mind of each party. Our law of contract is based on true agreement, and a party whose state of mind is '' On balance I think we are probably in agreement '' does not have a contract. So at this stage of the inquiry the court is looking through the eyes of the parties at their conduct and the circumstances , **and unless that conduct and those circumstances were so clear , so unequivocal , so unambiguous** that the parties must have regarded themselves as being in agreement there is no contract''. (Footnotes omitted; emphasis supplied.)

This approach is supported by the following dictum of Corbett JA in the *Cleveland Estates* case, *supra* at 165G:

> "In the cases concerning tacit contracts which have hitherto come before our Courts, there have always been at least two persons involved; and in order to decide whether a tacit contract arose the Court has had regard to the conduct of both parties and the circumstances of the case generally. The general approach is an objective one. The subjective views of one or other of the persons involved as to the effect of his actions would not normally be relevant (cf *Spes Bona Bank* case *supra* at 985-H)." (My emphasis)

[75] What is relevant in resolving this issue is the conduct of the defendant and late Opperman. I now examine the conduct of the parties which either prove or displace the existence of a tacit contract in the terms pleaded.

Consideration of the probabilities

[76] Campbell's version that late Opperman became a member of the defendant's retirement fund the moment he joined its employ, and that there was no significance in the fact his salaries for November and December were paid from the FGI account on exactly the same terms he enjoyed with FGI, is at odds with Low's testimony that if late Opperman died in December the benefits due would have been FGI benefits --from that fund. This and his attempt to down-play the clear implication of what he said at the road show in Windhoek that no firm decision had yet been taken (at that stage) about

the medical aid scheme and the pension fund in view of the take over of FGI by M&F, makes Campbell's evidence suspect.

[77] The evidence of the defence suggests that late Opperman was informed of the terms of his employment through a toolkit. Even assuming that the tool kit said, as stated by Low, that all employees of FGI were going to join the defendant on its terms and conditions, the defendant failed to show that late Opperman actually received the tool kit. Putting aside for a moment the improbability (or rather curious and inexplicable behaviour) that something as important as the conditions of employment of the most senior employee of the company should be treated in such a cavalier fashion, Barnard whom, it is said, was given the tool -kit for late Opperman, was not even cross-examined on that score. I therefore reject the version that through the tool kit Opperman was informed that the terms and conditions of his employment would be those of the defendant. I do not find anything improbable in the fact that late Opperman could have negotiated for himself terms and conditions which were different from the rest of the employees. I am fortified in that conclusion by the defendant's own admission that late Opperman and his two senior general managers were treated differently from the rest of the employees.

[78] I have shown the respects in which I find the evidence of the defendant's witnesses unsatisfactory apropos the communication of the terms of his employment to late Opperman prior to the letter of 15 January 2002. What makes it even more improbable that late Opperman was expressly told that he was joining on the defendant's terms and conditions, is the fact the defendant has chosen not to call any of the former FGI employees to buttress the version that FGI employees were told, understood and accepted that they were joining the defendant on its terms. I said earlier that that would not have counted against late Opperman for the reason I gave, but it would certainly have gone a long way in strengthening the

probabilities overall in defendant's favour that it expressly communicated the terms of his appointment. I heed the caution that the version of a living witness contradicting that of a person deceased should be approached with caution (as to which see *Cassel and Benedict NNO v Rheeder and Cohn NNO* 1991 (2) SA 846 (A) at 851 F-H .) That the defendant could not even rely on the testimony of witnesses still alive and in their employ to buttress an allegation that those people were told a certain fact, raises serious doubt whether their version in conflict with that of a person no longer alive should be believed.

[79] I will now list instances of conduct by each party which either negative or strengthen the existence of a tacit contract on the terms alleged by the plaintiffs.

[80] *Conduct which negative the existence of an agreement: late Opperman*

(i) He did not raise his dissatisfaction with M&F terms at the board meeting which he attended, being the first opportunity he had of doing so after his 15th January 2001 letter;

(ii) He accepted without demur the benefit deductions from his pay based on M&F terms and conditions from January 2002;

(iii) Not writing to Campbell when he received the proposed contract on 15 January 2002 and emphatically disagreeing that those were the terms agreed;

(iv) Failure to mention to the wife the specifics of the terms of his employment with the defendant and, subsequently, failing to mention to the first plaintiff (his wife) his disagreement with the terms proposed in the letter of 15 January 2002, when both he and the wife considered the terms and conditions of his transfer to the defendant such an important issue ;

[81] *Conduct pointing to the existence of an agreement: the defendant*

(i) The unequivocal statements during the road shows
(ii) The payment of salary to late Opperman based on FGI terms for the months of November and December 2001
(iii) The date of transfer of the pension fund, compared to the date of assumption of duty and the date of death of late Opperman
(iv) Opperman's refusal to sign the contract and lack of follow-up by M&F until the date of his death
(v) Opperman's letter of 26 February 2002 expressing unhappiness about net remuneration

[82] As for (ii) and (iii) under paragraph [81] above, the defendant's explanation is that same was unavoidable because of the fact that arrangements were then underway to complete the integration of FGI into the defendant. I do not find such explanation to be improbable or inconsistent with a view of the facts which states that this was only a transitional step and that eventually M&F terms and conditions were to apply.

[83] I wish to deal at once with the proposition made by Mr Frank that it must be accepted that the reason late Opperman did not complain in specific terms about the pension and death benefits in his letter of 26 February 2002, is because he assumed them to be what they were with FGI: i.e. that he had no reason to complain and that those terms could not in any event be altered unilaterally by the defendant. Mr Frank's reasoning loses sight of the fact that the issue was raised in very specific and pertinent terms by Campbell in the letter of 15 January 2002. One would have thought this was such an important variation in his terms of employment (if he thought the contrary was agreed), that he would have raised the alarm at this stage at the highest level possible and seek to have the matter resolved. He is said not to have raised the matter at the board meeting held and/or there is no evidence he

pursued the matter after the deadline given in his letter of 7 February came to pass. There is no record anywhere that he, in writing as one would expect, placed on record that he did not accept that he was employed on M&F terms and conditions.

[84] Therefore, what really counts against the plaintiffs is the conduct of late Opperman after January 2002. Beyond that date, not only was his basic pay based on M&F terms and conditions, but his other benefits such as pension and medical aid were on the defendant's terms and conditions. That he was unhappy about that is an understatement, but he did nothing. I do not think it assists the plaintiffs in the circumstances to argue that the benefits could not have been unilaterally changed - when he himself, when alive, did not show his displeasure more unambiguously.

[85] Mr Frank argued that Low's concession that for the months of November and December 2001 late Opperman was employed on FGI terms has the effect that subsequent thereto those terms could only change if late Opperman agreed and that such a change, which would amount to an allegation of acquiescence or novation by late Opperman, is neither pleaded nor proven by the defendant and that in any event, the *onus* in respect of it would rest on the defendant. I apprehend the real issue here is were the probabilities lie rather than whether or not Opperman acquiesced or novated rights which became vested: if he was promised as alleged, could he not have done more than what we know he did after January 2002 when it became apparent he was being treated as if on M&F terms and conditions? Regard being had to the fact that he knew in January 2002 that he was now on M&F retirement fund. Could he have failed to place on record his disagreement and more importantly to inform his wife about this? We know on the evidence that his wife knew none of this detail, yet it was a matter close to their hearts.

[86] I take the view that because late Opperman, Barnard and Katjimune were treated differently from the rest of the staff, proving *what* in fact was done to the rest of the FGI personnel in respect of the benefits which are the subject of the present dispute, does not advance the defendant's version that Opperman received the same treatment as the rest of the FGI employees.

[87] I find on the evidence that the defendant carelessly (and without properly considering the implications thereof) conducted itself to Opperman in a way which could have induced in him the belief that he was becoming an M&F employee on the same terms of employment that he enjoyed with FGI. The version put forward in evidence by the defendant's senior managers that they could not speak on behalf of, or commit, the pension fund and medical aid scheme (because they are separate legal entities) flies in the face of their actual conduct. Not only did they fail to give that version to the employees (at least on the occasion that the question was pertinently put) but they in fact spoke on behalf of those entities. Whether or not, in law, they could, is another issue. The fact is they did. As I initially understood the pleadings, the claim in the alternative was directed at that. That claim, as shown earlier, is however no longer being pursued and I need not therefore say anything further about it.

[88] A difficulty which presents itself in this case is the fact that when Opperman died the FGI pension fund was legally still in existence although the evidence shows that from January 2002 he began to make contributions to the M&F retirement fund. In fact, rather strangely the decision of the board of trustees of the FGI fund states that the benefits are paid the first plaintiff from *that* fund. This when the defendant maintains not only that late Opperman was no longer a member of the FGI fund from January 2002, but that by then the benefits accumulated under the FGI fund had been transferred to the M&F retirement fund. The plaintiffs' claim is not

formulated to seek relief on the basis that the benefits payable to Opperman's beneficiaries should have been under the FGI fund. The present claim is predicated on an agreement (express or tacit) that the defendant accepted to be bound to honour late Opperman's terms and conditions with FGI although a member of the M&F fund.

[89] I am unable on the evidence to find that the plaintiffs established on a clear balance of probabilities the existence of the tacit contract alleged in paragraph 10 of the particulars of claim, although there is much to be said in this case about the less than decent way in which the defendant treated its FGI employees. The case brings to the fore the classical example of a commercial interest being vigorously and robustly pursued at the expense of the employees (of a company being taken over) who clearly were desperate to retain their jobs and thus were vulnerable.

[90] On the claim based on a tacit contract, at best for the plaintiffs, the probabilities are evenly balanced and I must resolve the benefit of the doubt in favour of the defendant much as I take a dim view of the conduct of the defendant. This is in view of late Opperman's ambiguous conduct after January 2002.

[91] I am unable to conclude on the evidence that the plaintiffs established on a preponderance of probabilities conduct and circumstances which are so clear, so unequivocal, so unambiguous that the parties must have regarded themselves as being in agreement that late Opperman was on 1st November 2001 employed by the defendant on the same terms and conditions (including death and pension benefits) that he enjoyed with FGI , and that the defendant must have regarded itself bound and obligated to make up the difference in benefits to the plaintiffs between the M&F retirement fund and the FGI pension fund.

[92] In the result the plaintiff's claim is dismissed with costs, including the costs of two instructed counsel.

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DAMASEB, JP

ON BEHALF OF THE PLAINTIFFS: **Mr T J Frank, SC**

Assisted By: **Mr G Coleman**

Instructed By: **MOSTERT LEGAL PRACTITIONERS**

ON BEHALF OF THE DEFENDANT: **Mr B Sceales, SC**

Mr A E Franklin, SC

Assisted By: **Mr J Schickerling**

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