IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL HOLDEN AT LUSAKA

2014/CCPT/014/CON

BETWEEN:

AFRICAN LIFE ASSURANCE LIMITED **APPELLANT**

AND

THE COMPETITION AND CONSUMER PROTECTION COMMISSION **RESPONDENT**
(Re Martin Illunga)

QUORUM: Mr. Willie A. Mubanga, SC (Chairperson), Mr. Chance Kabaghe (Member), Mr. Rocky Sombe (Member) and Mrs. Eness C. Chiyenge (Member)

For Appellant: Mr. Mark Mweempwa Haimbe – Messrs Sinkamba Legal Practitioners

For Respondent: Mrs. M. M. Mulenga – Manager, Legal & Enforcement

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JUDGMENT

Legislation referred to:

Competition and Consumer Protection Act, No. 24 of 2010 sections 45 (b), 46 (1) and (2) and 49 (5)

The background to this appeal is that Mr. Martin Illunga (whom we shall refer to in this judgement as "the Complainant"), by letter received on 25th October 2011, lodged a complaint with the Competition and Consumer Protection Commission (whom we shall refer to in this judgment as "the Respondent"). The complaint was against African Life Assurance Limited (whom in this judgment we shall refer to as "the Appellant").

The complaint was that the Complainant took out a Life Policy on 20th January 2010, number ZM1V0206243 at a monthly premium of K87,120.00 which he started contributing on 30th June 2010, and which he cancelled on 30th June 2010. However, on 14th January 2011, the Complainant received from the Appellant a Family Protection Assurance Policy number

ZM2V0036082 with a monthly premium of K133,500.00 which he had not signed for. He cancelled this policy also on 15th February 2011. Meanwhile, a monthly premium deduction had started on 30th December 2010, and the premium was doubled starting on 28th February 2011 bringing the monthly deductions to K354,120.00.

The Complainant further alleged that on 1st September 2011 he went to the Appellant's offices at Solwezi for his April and May 2011 refunds and found a Mr. Pumulo who got his June 2011 pay slip to check for the refunds. That when he later on the same day returned the pay slip to the Complainant he demanded for K100.00 for the job and the latter gave him K50.00. The Complainant further complained that when he went back to the Appellant's offices on 10th October 2011 for his last refunds (for June and July 2011), he discovered through the typist that the cancelled Assurance Policies had been renewed and the deductions were due to start in November 2011.

The Complainant asked the Respondent to investigate the matter and to do away with the Appellant's assurance policies, claiming that he had never signed them. He attached his July 2011 pay slip for evidence of the deductions.

(See pages 1 – 3 Record of Proceedings)

By letter dated 11th November 2011, the Respondent wrote to the Appellant bringing to its attention the Complainant's allegations (leaving out only the allegation that on 10th October 2011 when he went to collect the last refunds he discovered that the cancelled policies had been renewed). The Respondent also expressed concern with the number of cases it had registered against the Appellant and proposed a meeting between the Appellant, the Pensions and Insurance Authority (PIA) and the Respondent at its offices. (See page 7 – 8 Record of Proceedings)

Following the said meeting, the Appellant wrote to the Responded by letter dated 30th November 2011 that the Complainant had cancelled his policy number ZM1V0119093 on 21st December 2010 and to that date he had been refunded K1,903,720.00. That the cancellation of his policy payments was advised through to the Government payroll authority, PMEC, whose role and function then would be to stop the monthly premiums being deducted. That this was therefore out of its control but if further deductions were made, the Appellant as a matter of course would refund them as soon as the appellant analysed its monthly payment schedule from Government.

During its investigations, the Respondent also consulted Professional Life Assurance on 12th January 2012. In a conference call organised by Mrs. Norah Chiti, and Mr. Fred Shimbi, both of Professional Life Assurance they submitted that whenever clients cancelled their policies, the maximum number of months it took to stop the deductions was three months and that they had no incident where it took more than three months before it could reflect on the pay slips that deductions had stopped.

The Respondent also held a meeting with a Mr. George Mbasela and a Mr. Mwalula Mwandalesa, both of Payroll Management and Establishment Control (PMEC) (of Government). They submitted that the role of PMEC was to offer support and infrastructure and not to do the entries. They further submitted that when policies were opened, insurance companies submitted a list in soft copy of those under Direct Debt Business that were supposed to be debited for that month to PMEC. Hence the early positing of the transactions on their pay slips to assure insurance companies a safer way of recovering their money.

The PMEC officers submitted that, however, when it came to stopping deductions a list was not sent and that there was need for individual clients to stop deductions from their pay points. That PMEC was decentralized in all provinces and in Lusaka it took place at the Ministry of Finance. Entries done after 10th of a month would reflect on the pay slip the following month. That it was the job of respective employers to make sure that entries were done in time and correctly. Further that clients should be informed that cancelling a policy alone was not enough as they had a duty to go to their respective institution HR (i.e. Human Resource) officers to inform them of the changes. That the delay in effecting the stopping of deductions was therefore at institutional level.

With regard to double deductions, PMEC submitted that it was mostly the fault of insurance companies who would have submitted a soft copy of those on DDB twice to PMEC or it could be that the individual had an arrear because at one month the insurance company did not get the premium payment for a particular month.

By its decision on 8th June, 2012, the Respondent's Board reached the verdict that the Appellant had contravened section 46 (1) as read with section 45 (b) and also breached section 49 (5) of the Competition and Consumer Protection Act. The Respondent gave reasons for its verdict that the Appellant had contravened provisions of the said Act, *inter alia*, that:

With respect to section 46 (1) as read with section 45 (b):

(a) The Appellant engaged in a trade relationship with the Complainant which was unfair in that despite policy cancellation, the Appellant sought to perpetuate this relationship unilaterally and as a result, the Complainant was made to part away with some of his money which were going towards premiums without his consent. Further, that despite the policy being cancelled, the deduction continued and even became double deductions making it unfair.

With respect to section 49 (5):

(b) That records from similar cases involving the Appellant received by the Respondent showed that first deductions happened within two months of policy opening while stopping deductions after policy cancellation took unreasonably longer. That the disparity between the two showed that the Appellant took every effort to start the

deductions and paid little or no attention when stopping the deductions once policies were cancelled which was an indication of clear neglect of duty on the part of the Appellant and a clear failure to follow through within a reasonable time. Further, that the Appellant did not take time or care to inform the Complainant to approach his pay point with a stop order from the Appellant in order to effect the stopping of deductions, as submitted by PMEC.

The Board, noting that this was the third case the Respondent had handled and the Appellant had been found to be in violation of the said sections on all occasions, ordered:

(a) That the Appellant be warned to desist from such conduct and that a fine equal to one percent (1%) of the Appellant's annual turnover be applied based on the following:

(i) Prevalence of offence, i.e. whether the conduct is widespread and the application of a sanction is likely to have a wise deterrent effect;

The (Respondent) has only received such complaints against the Appellant and hence it can be concluded that it is not an industry wide practice but specific to one (the Appellant).

(ii) Any history of complaints against the offender;

The Respondent has received over four (4) cases of the same nature involving the same (Appellant) and all bordering on dishonest conduct by the Appellant.

(iii) Whether the offender has been the subject of previous enforcement action by the (Respondent);

The (Appellant) is aware of the (Respondent's) concerns over its conduct. The (Respondent) has not fined the (Appellant) but has warned them over the previous violations.

(iv) Whether the offender has demonstrated a resistance to reconciliation;

The (Appellant) has been very cooperative.

(v) The need to deter the current offender and other possible offenders from engaging in the same conduct;

There is a strong and urgent need to deter the offender and other would be offenders from carrying or engaging in fraudulent activities.

(b) That PMEC be warned that it might be an accomplice in fraudulent activities by the insurance companies by facilitating the starting of deductions from clients' salaries without proper verifications.

(c) That a letter is drafted to the Secretary to the Treasury raising these concerns.

The decision, which was sent to the Respondent under a letter dated 20th June 2012, was delivered to the Appellant on 26th June 2012, receipt of which was acknowledged by official stamp. On 31st July 2012, the Appellant wrote to the Respondent seeking review of its decision. This request was made on the following grounds:

(a) That submissions by a third party Professional Life Assurance and criteria used to identify persons (two employees of Professional Life Assurance) was subjective because Mr. Fred Shimbi a former employee of the Appellant who had recently joined Professional Life Assurance may not have been fair in providing investigative information. That in addition, Professional Life Assurance was a competitor.

(b) That the Complainant was a Government employee in North Western Province whose subject policy number ZM1V0119093 was cancelled on 21st December 2010 and was subsequently refunded money amounting to K1,903,720.00. Further, that the cancellation was channelled through PMEC whose function or role was to ensure no further monthly deductions and that at that point the Respondent had no control or influence to the government system.

(See pages 45 – 447 Record of Proceedings)

The Respondent's internal memo dated 15th August 2012 (see page 49 Record of Proceedings) indicates that there was also a letter of appeal written to the Respondent by the Appellant dated 24th May 2012. We have not seen this letter, which would have preceded the decision of the Board of Commissioners, which was passed on 8th June 2012. The contents of this letter appear to have been confined to complainants other than the Complainant herein (see pages 49 – 50 Record of Proceedings paragraphs 3 – 7, paragraphs 3 -7 and the rest of page 50 – 51 before "General Comments"). Thus the grounds of request for review of the Respondent's decision are only those already outlined above.

The Respondent declined the Appellant's request for review of its decision, and by letter dated 17th August 2012 responded to the Appellant's grounds for review as follows:

(a) The submissions collected by the Respondent from Professional Life Assurance were based on the company's experience and not individual opinions. That in the inquiry the Respondent had never mentioned that the information sought was for the investigations of the Appellant or any other party, hence it was purely a research discussion. That when conducting investigations in any matter, the Commission uses a multi-approach

strategy to get information and in this case, the Respondent had no prior information that Mr. Shimbi was an ex-employee of the Appellant. That, therefore, Professional Life Assurance was randomly chosen as a market player with significant market size. That the assertion that Professional Life Assurance was a competitor was irrelevant as the Respondent had to collect the information from a market player anyway.

(b) That while it was true that policy number ZM1V0119093 was cancelled and paid for in full, the Appellant had deliberately left out policy number ZM2V0036082, which according to the Respondent was effected without the client's consent and for which the Complainant incurred double deductions. That it was this second policy that was under contention and not the first.

(See page 52 paragraph four and page 53 paragraph five)

It appears from the Record of Proceedings (pages 57 – 68 Record of Appeal) that some period of silence followed until 2014 when the Respondent realised that the Appellant had not paid the fine. When contacted by the Respondent, the Appellant, by letter dated 24th June 2014 expressed ignorance concerning the Respondent's decision of 8th June 2012. The Appellant claimed that according to their records, they had been waiting for a response to their appeals (requests for review) communicated by their letters dated 24th May 2012, allegedly in respect of the Complainant herein, and 31st July 2012, allegedly in respect of Mwangala Litaba.

We note that, like the respondent, the Appellant apparently experienced memory lapse because the records we have earlier referred to show that they received the letter from the Respondent by which the decision of its Board was communicated. Further, the letter dated 31st July 2012, which we have referred to above, discussed the case of the Complainant herein.

Suffice it to state that on 10th September 2014 the Appellant filed an application before the Tribunal seeking leave to appeal out of time, which application was opposed by the Respondent but was granted by the Tribunal. The following are the grounds of appeal stated in the Appellant's Notice of Appeal filed on 18th December 2014:

(a) That the Respondent erred in fact and law in finding that the Appellant breached the provisions of the Competition and Consumer Protection Act.

(b) That the Respondent erred in fact and law in finding that the Appellant ought to be fined 1% of its annual turnover as it ignored evidence to the effect that the continued deductions were as a result of oversight on the part of Government.

(c) That the Respondent erred in fact and law by ignoring that the Appellant did everything to have its client's policy cancelled from the Government's payroll.

Further, the Appellant is seeking the following relief:

(a) That the decision/directive of the Respondent dated 8th June 2012 be set aside.

(b) That in the alternative the matter be referred back to the Respondent for rehearing.

(c) That costs be awarded to the Appellant.

In its grounds in Opposition to Appeal filed on 6th February 2015, the Respondent opposed the appeal on the following grounds:

(a) The Respondent did not err in finding that the Appellant had breached the provisions of the Competition and Consumer Protection Commission Act No. 24 of 2010 as the Appellant did in fact continue making deductions from the Complainant's salary despite the Complainant cancelled the policy thereby breaching sections 45, 46 and 49 (5) of the Act.

(b) That the Respondent did not err in fact and law in directing that the Appellant be fined 1% of its annual turnover as all evidence availed to the Respondent by the Appellant and other third parties showed had been carefully analysed and at no time did the Respondent find an oversight on the part of Government.

(c) Contrary to the Appellant's assertion in ground 3, the Respondent did not err in fact and law as the Appellant did not submit any evidence to show that they had instructed the Government to proceed with the policy cancellation at the time the Complainant cancelled the policy and even after the Complainant still complained that deductions were still being effected following cancellation of the policy with the Appellant.

At our sitting on 26th February 2015, counsel for the two parties said they were not tendering further evidence and therefore they did not wish to call any witnesses; instead they sought leave to file Heads of Argument. We granted the application and directed the two parties to file their respective Heads of Argument and scheduled the next hearing for 16th March 2015. On the return date, Mr Sinkamba appeared on behalf of counsel for the Appellant Mr Haimbe and informed us that his colleague had a bereavement. The Heads of Argument had not been filed and we directed the two parties to file their submissions by 30th March 2015.

At our sitting on 28th May 2015, there was no appearance for the Appellant and no Heads of Argument or Submissions had been filed for the Appellant. Instead, the Appellant's Advocates on 4th April 2015 filed an application to join the Attorney-General allegedly because, according to the Affidavit in support of the application sworn by Mr. Haimbe, *"the liability inferred by the Complainant was caused by the latter's employer as it omitted to implement the removal of the*

Complainant's salary from deduction as instructed by the former." The Respondent had proceeded to file its submissions on 4th May 2015.

We directed that in view of the level of irresponsibility exhibited by counsel for the Appellant, we would proceed with judgment, which we reserved.

We have given serious consideration to the legal issues raised in this appeal and the evidence on record. The statutory provisions in question read as follows:

"45. A trading practice is unfair if-

(b) it compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet."

46. (1) A person or an enterprise shall not practice any unfair trading.

(2) A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher."

"49. (5) A person or an enterprise shall supply a service to a customer with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time."

Subsections (6) and (7) of section 49 further stipulates the fine for contravention of subsection (5) and other mandatory requirements imposed on an offender, respectively, as follows:

"(6) A person who, or an enterprise which, contravenes subsection (5) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover.

(7) In addition to the penalty stipulated under subsection (6), the person or enterprise shall-

(a) within seven days of the provision of the service concerned, refund to the consumer the price paid for the service; or

(b) if practicable and if the consumer so chooses, perform the service again to a reasonable standard.

We will deal with all the grounds of appeal together since the issues they raise are interrelated. Counsel for the Appellant has not filed any Heads of Argument or submissions. The Respondent has argued that the Appellant breached sections 45 (b, 46 (1) and 49 (5) of the Act. That the Appellant did not cancel the policy as per the Complainant's instructions but instead opened a second one without his consent, thereby compromising the standard of honesty and good faith which they were reasonably expected to meet. That the Appellant was unfair to the Complainant in that in addition to failing to effect the cancellation of the first policy, it doubled the deductions.

It is not in dispute that the Complainant cancelled his initial life assurance policy with the Appellant in December 2010 but instead of stopping the deductions, the Appellant issued him with another policy, a Family Protection Assurance Policy, and on 28th February 2011 doubled the monthly premium deductions. This was after he had, on 15th February 2011, cancelled the second policy as well. The Appellant exhibited his pay slip showing that in July 2011, these deductions were still running (see page 3 Record of Appeal). In his letter, the Complainant stated that he went to collect his last refunds (June and July 2011 deductions) from the Appellant's offices in Solwezi in October 2010. In essence, this was the complaint raised with the Respondent, as contained in the Complainant's letter, which contents were communicated by the Respondent to the Appellant by letter (both letters are referred to in the background we have given at the outset).

The foregoing allegations were not disputed by the Appellant. Instead, the Appellant in its reply stated that it had cancelled policy number ZM1V0206243 and refunded the Complainant in full. Further that the cancellation of the payments was advised through PMEC whose roles according to the Appellant, was to stop the payments, which it alleged was completely out of the Appellant's control. We referred to the Appellant's letter in response to the allegations at the outset. The Appellant did not present any evidence to counter and neither did it deny the dishonest conduct and lack of good faith which were plainly imputed in the Complainant's allegations, which allegations were conveyed to the Appellant. Further, in relation to the Appellant's second and third grounds of appeal, the Appellant merely made an allegation but adduced no evidence that it had presented stop deduction instructions to the Government payroll authority, PMEC. Indeed, we note from the Complainant's letter that the Complainant collected refunds directly from the Appellant's offices in Solwezi, not through payroll deductions.

Furthermore, according to the Respondent's report on its investigations and its findings, the PMEC officers explained that although "start deductions" instructions were received from insurance companies and effected at the centre (Ministry of Finance), the system was decentralised and "stop deductions" instructions were conveyed through the respective employer institutions; and that clients needed to be informed that they should approach their respective employer institutions.

We observe that, in fact, the PMEC system was tilted in favour of the insurance companies in that it employed a "down – up" route for stopping deductions while the starting of deductions was effected more efficiently, at the centre. Moreover, we deduce that the Appellant, being the party that sells the policies and issues "start deductions" and "stop deductions" instructions, cannot sincerely claim that it had absolutely no control over the deductions and fold its arms. The Appellant cannot pass the fault on to the Government on account of PMEC, which was only executing instructions of the Appellant on the latter's behalf. The Appellant initiated the process and had a duty to take reasonable steps to ensure that "stop-deduction" instructions were also effected within reasonable time, even if this required to be done through employer

institutions. Even without the evidence submitted by Professional life that in practice three months was the limit in effecting stop payment instructions (which evidence, we note, has not been contested on appeal) the time lapse in this case was obviously excessive.

It has not escaped our attention that the Appellant faced claims from at least three other complainants with similar complaints, in some of which the Appellant was found in breach by the Respondent, as the record shows. The Appellant has not contested this finding by the Respondent. Interestingly, although in its decision the Respondent's Board stated that it had not previously fined the Appellant, in fact it had done so. For example, in the Mwangala Litaba case, which was decided on 16th March 2012, the Respondent fined the Appellant. The contradictory assertion by the Respondent reflects negatively on the institution's commitment to diligently scrutinising matters under reference in decisions of its Board.

On the totality of the evidence, we agree with the Respondent that the Appellant did breach sections 45 (b), 46 (1) and 49 (5) of the Competition and Consumer Protection Act, No. 24 of 2010 and that the Appellant was properly fined pursuant to sections 46 (2) and 49 (6) of the Act, respectively. Appeal dismissed with costs to the Respondent, to be assessed in default of agreement.

Any person aggrieved with this decision may appeal to the High Court within thirty (30) days of the determination.

Delivered at Lusaka this 17th day of August 2015.

REPUBLIC OF ZAMBIA
MINISTRY OF COMMERCE, TRADE AND INDUSTRY
17 AUG 2015
COMPETITION AND CONSUMER PROTECTION TRIBUNAL
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