

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 223/99

In the matter between:

JOTHAM SIMELANE

APPLICANT

and

THE CIVIL SERVICE BOARD

1ST RESPONDENT

THE CHAIRMAN-CIVIL SERVICE BOARD

2ND RESPONDENT

THE PRINCIPAL SECRETARY-MINISTRY OF

PUBLIC SERVICE

3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR THE APPLICANT:

MR. L. SIMELANE

FOR THE RESPONDENT:

MR. F. GRAHAM

RULING

4.04.2000

The Applicant obtained an *ex parte* judgement in his favour by this court for compensation for unfair dismissal, notice pay, additional notice pay and severance allowance in the sum of E34,110.78.

The court in addition directed that the Applicant be treated as a retired employee for the purposes of computing his benefits under the Pensions Act.

The Respondents have since paid off the judgement debt of E34,110.78 to the Applicant.

The Applicant has brought this application alleging that the Respondents through the office of the Attorney General have failed or neglected to cause the Applicant to be paid his benefits under the Pensions Act.

The Applicant in the circumstances seeks for an order in the following terms:

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"1. Directing the first and third respondents to pay the Applicant his gratuity and pension as is to be paid to a retired officer in terms of the Public Service and Pensions Act as directed by this Honourable Court:

2. Calling upon the first and second respondents to show cause at the hearing of this matter why:

2.1 The second and third respondents should not be committed to jail for contempt of court for wilfully disregarding a court order".

The 3rd Respondent who should have been correctly cited as the Principal Secretary in the Ministry of Public Service and Information is the deponent of the answering affidavit and states as follows in reply :

"10. I deny there has been any refusal to comply with the decision of the court and put the Applicant to the strict proof thereof

11. The applicant was paid his pension fund contributions and is therefore no longer a member of the fund.

12. In pursuance of the order of this Honourable Court, the applicant's file has been sent to the Pension Fund for their action although I am of the opinion that having been paid his contributions he cannot be paid anything from the fund".

It was further argued by Mr. F. Graham that in terms of Section 34 of the Employment Act, an employee who has been paid severance allowance is not entitled to further payment of benefits under the pensions fund.

Mr. Graham added that even if the applicant was entitled to payment of gratuity this was the domain of the Public Service Pension fund which is a separate statutory entity from the respondents herein.

That having forwarded the relevant file to the Pensions Fund there was no more they could do than wait for it to be actioned by it. We observe that the Public Service Pension Fund should have been cited as a party in the proceedings to enable the Applicant to execute against the fund should there be non compliance. This was not done.

In the circumstances it would be inappropriate to hold the 2nd and 3rd respondents in contempt of the order of the court. They have demonstrated that they have done all in their power to satisfy the judgement of the court save for the part that was beyond the ambit of their authority.

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It was however submitted by Mr. Graham that the cause for no payment is based on the belief by the Pensions Fund authority that it was sufficient only to refund the Applicant his statutory contributions and no more in the circumstances of the case.

The Principal Secretary of the Ministry of Public Service and Information has similarly stated in paragraph 11 of the Answering Affidavit. It is common cause that the Applicant had been in continuous employ of the Respondent from the 1st December 1975 up to the 18th December 1996, a period of approximately twenty (20) years.

In terms of Part 111 of the Public Service Pension Fund Regulations and in particular Regulations 7 (1):

"Subject to these Regulations, no member shall qualify for any benefit under this part, unless he has ten (10) or more years of service to his credit.

7(2):

"A member who retires or resigns from the Public Service for reasons other than disability as defined in Part 1 V before having ten or more years of service to his credit shall be entitled to a refund of his contributions".

The necessary implication of regulations 7 (1) and 7 (2) is that:

1. A member who has served more than ten (10) years is qualified to receive all the benefits under Part 111 which is headed "Retirement Benefits".

2. A member who retires or resigns from Public Service, for reasons other than disability shall be entitled to a refund of his contributions if he had not served ten or more years.

The applicant was declared by an order of this court to be a retired employee. This is retirement for reasons other than disability. He had served 20 years with the Public Service and was therefore not entitled only to his contribution but to all the available retirement benefits under Part 111 of the regulations.

The issue as to whether an employee who has been paid severance allowance under Section 43 (3) of the Employment Act No. 5 of 1980 is also entitled to his gratuity pension or provident fund was resolved by the Court of Appeal of Swaziland in the case of The Trustee of Swaziland Railway Gratuity Scheme and Swaziland Transport and Allied Workers Union Appeal Case No. 1142/93.

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In that case the Appellant had appealed against the order of the High Court for payment of gratuity to 76 employees who had been terminated and had been paid severance allowance.

The Appellant in opposing the application at the court Aquo alleged the following in its Answering Affidavit:

"9.1 All the retired employees were paid severance allowance in terms of the provisions of Section 34 of the Employment Act No. 5 of 1980.

9.2 The said severance allowances were equal to, or exceeded the respective amounts payable by way of gratuity.

9.3 In terms of Section 34 (3) of the Employment Act, the Swaziland Railway is entitled to set-off the amount of gratuity payable against the severance allowance and paid in respect of each retrenched employee.

9.4 In the premises, no gratuity is payable".

In rejecting these submissions by the Appellant Justice of Appeal, Browde stated the following on page 4 of the judgement:

"There is no provision in the Act which empowers the employer to set off against the severance allowance any gratuity which might be due to the employee under his contract of employment but Mr. kades, who argued the appeal before us, submitted that if the employee is paid both the severance allowance and the gratuity he would be receiving "double severance".

He basis this submission on the effect of Section 34 (3) of the Act the relevant portion of which reads as follows:

'34 (3) If an employer operates or participates in and makes any contribution to any gratuity, pension or provident fund..... which is operated for the benefit of his employees the employer on termination of employment of an employee shall be entitled to repayment from the gratuity, pension or provident fund equal to the employer's total contribution to that gratuity, pension or provident fund in respect of the employee to which a severance allowance is to be paid wider this Section'.

Mr Kades submitted to us that since the Appellant has to pay a gratuity in terms of the. Rules of the scheme and also has to refund the contribution made to the fund by the employer this amounts to double allowance to the employee. In my view there is no substance in this submission".

The judge added that Mr. Kades' argument ignores the contractual right to the gratuity and his statutory right to a severance allowance in terms of the Act.

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The situation analysed by the Court of Appeal is on the fours with the matter before us.

The Public Service Pension Fund is under an obligation to pay the pension due to the Applicant under Part 111 of the Regulations and it is also obliged in terms of Section 34 (3) to refund an amount equal to the severance amount already paid to the Applicant to the Applicant's employer, the 1st and 3rd Respondents.

This situation was justified by Browde J. A. As follows:

"It seems to me that the purpose of legislating for the payment of contributions he has undertaken to make to a fund constituted in order to provide a gratuity or a pension for the employee, is to ensure that the employer is not seriously disadvantaged by being obliged by statute to pay severance allowances. Added to this is the fact that the trustees of the fund are empowered.....to lend, invest, put out at interest, place on deposit, make advances or otherwise deal with the monies of the fund in such manner as they may determine.

It is obviously envisaged that with prudent use of the money and wise investment, the fund would both earn interest from the contributions made by the employer as well as achieving capital appreciation. If this happened the fund should be able to repay the contributions to an amount as laid down in Section 34 (4) of the Act, that does not exceed the total amount of the severance allowance without suffering any hardship".

In the light of the above, the submissions by Mr. Graham for the Respondents that the Public Service Pension Fund was not obliged to pay pension benefits to the Applicant because he had already received his contributions to the fund and because he had been paid severance allowance was based on a misconception of both the regulations of the Pension Fund and Section 34 (3) of the Employment Act No. 5 of 1980.

The Respondents are consequently ordered to put the necessary machinery in place to ensure that the order of the court is complied with by the Public Service Pension Fund. Should non compliance persist, then the Applicant has the option of instituting a fresh application against the Pension Fund on the strength of the judgement of this court as the fund was not a party to these proceedings.

There will be no order for costs.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT