



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Civil Appeal case No: 42/12

In the matter between:

HENRY MASEKO

APPELLANT

AND

CENTRAL BANK OF SWAZILAND

1st RESPONDENT

CENTRAL BANK OF SWAZILAND

RETIMENT FUND

2nd RESPONDENT

CYNTHIA LUKUMBA

3rd RESPONDENT

SIZAKELE MSIBI

4th RESPONDENT

NTOMBIFUTI MSIBI

5th RESPONDENT

DUMA ZWANE

6th RESPONDENT

ESHMON DLAMINI

7th RESPONDENT

JACK BOHARRIE

8th RESPONDENT

MPUMELELO MNISI

9th RESPONDENT

METROPOLITAN LIFE LTD

10th RESPONDENT

Neutral citation: *Henry Maseko and Central Bank of Swaziland and 9 Others (42/12) [2012] SZSC64 (30th November 2012)*

CORAM: M.M. RAMODIBEDI CJ, S.A. MOORE JA, M.C.B. MAPHALALA JA,

Summary

Civil Appeal – appeal against the judgment of the court *a quo* dismissing an application to release pension benefits of the appellant – appeal subsequently withdrawn during the hearing at the instance of the appellant –respondents entitled to costs of the appeal.

JUDGMENT

M.C.B. MAPHALALA, JA

- [1] This is an appeal against the judgment of the Court *a quo* in dismissing an application to release the appellant's pension benefits. Four grounds of appeal were noted. Firstly, that the Court *a quo*, erred in law and in fact in holding that the respondents are legally entitled to withhold payment of pension benefits due to the appellant on the reasons alluded to by the Court *a quo*. Secondly, that the Court *a quo* erred in law and in fact in holding that it was the duty of the appellant to file a notice of bar in order to prompt the first respondent to properly pursue its claim against the appellant.
- [2] Thirdly, that the Court *a quo* erred in law and in fact in not applying the Rules governing the Pension Fund and in particular Rule B2.5 which is applicable within the undertaking of the first respondent. Fourthly, that the Court *a quo* erred in law and in fact in holding that employers and Pension Fund Regulators are entitled to withhold payment of pension monies without authority from the Court.
- [3] The appellant instituted an application on the 17th December 2010 in the Court *a quo* for an order directing and/or compelling the respondents to process and pay to him the amount of E334 666.94 (three hundred and thirty four thousand six hundred and sixty six emalangeneni ninety four cents) being a withdrawal benefit from the first respondent. The appellant was employed by the first

respondent on the 1st June 1979 and remained in service until August 2009 when he tendered his resignation with the first respondent. The appellant was also a member of the second respondent, being a Retirement fund, established to provide for the retirement benefits of employees of the first respondent. The third to the ninth respondents are members of the Board of Trustees for the second respondent. The tenth respondent is the Administrator of the second respondent, the Retirement Fund.

[4] The appellant conceded that the first respondent initially declined to accept his resignation and opted to prefer certain charges against him for irregularities in the course of his employment; subsequently, he was called to appear before a disciplinary hearing. However, he refused to attend because he was no longer an employee of the first respondent. An attempt by the first respondent to terminate his services did not succeed after he had lodged an application to the Industrial Court for a declaratory order that he had lawfully resigned; the first respondent subsequently conceded that the appellant had lawfully resigned from his employment.

[5] The appellant further argued that the second respondent was ready to pay him his benefits of E334 666.94 (three hundred and thirty four thousand six hundred and sixty six emalangeneni ninety four cents) but was stopped from processing payment by the first respondent.

[6] The application was opposed by the respondents. The third to the tenth respondents filed an Answering Affidavit in which they conceded that the appellant was a member of the Fund and that he was entitled to the withdrawal benefit in terms of Rule A3. The Rule provides the following:

“If a member terminates his/her service with the Employer before the Normal Retirement Age and such member is not entitled to any other benefits under the Fund, the withdrawal benefit set out in the Schedule shall be available to him/her subject to the restrictions on the application thereof set out in Rule A3.3 . This Rule applies *mutatis mutandis* to a member whose service is terminated by the Employer.

The Member may elect to either:

- (a) Preserve his/her benefit by leaving it in the Fund in terms of Rule A3.2 in which case he/she shall become a Deferred Beneficiary; or**
- (b) Take his withdrawal benefit in cash, as set out in Rule 3.3.”**

[7] Rule A3.3 provides the following:

“The withdrawal benefit shall be paid to the Member in cash or, if the Member so wishes, transfer to another approved provident fund, pension fund or retirement annuity fund.”

[8] However, they argued that they were entitled to withhold payment of the appellant’s benefits pending the outcome of High Court Civil Trial No. 3753/09 in accordance with Rule B2.5.1, Rule B2.5.2 and Rule 2.5.3 of the Fund.

[8.1] Rule B2.5.1 provides the following:

“The Board of Trustees may pay the Employer of the Fund from any benefit to which a Member or other beneficiary is entitled in terms of the Rules any debt in respect of:

- (a) Housing loans as contemplated in Rule B1.3.16; or**
- (b) Any theft, dishonesty, fraud or misconduct by the Member, in which the Member has either;**
 - (i) Admitted liability to the Employer; or**
 - (ii) Judgment has been obtained against the Member in any Court.”**

[8.2] Rule B2.5.2 provides the following:

“Where a severance allowance is payable in accordance with the Employment Act to a Member on termination of employment, the Employer shall be entitled to recover from the Fund an amount equal to the Employer’s Contributions Account after the deduction of any interest thereon in respect of the Member, provided that such amount shall not exceed the amount of the severance allowance payable to the Member under the said Act.”

[8.3] Rule B.2.5.3 provides as follows:

“The Board of Trustees shall have the right to make such deductions from the benefit to which a Member or other beneficiary is entitled in terms of the Rules and in respect of which a claim had been lodged in writing within such reasonable time of the event giving rise to the benefit

as the Board of Trustees may from time to time fix for making such claims.”

[9] They emphasized that they were not contesting the payment of the withdrawal benefit, but that it was essential to await the outcome of the action instituted against the appellant by the first respondent since that would determine the manner in which the benefit would be paid in terms of the Rules of the Fund. However, they conceded that when the appellant resigned, he had not been notified of the pending disciplinary proceedings against him; however; they alleged that his resignation was in anticipation of the charges since he was aware of the investigations that were being conducted against him by the first respondent.

[10] They further submitted that the pending action against the appellant under High Court Civil Trial No. 3753/09 is for the recovery of the amount of the loss occasioned by appellant's acts of fraud in excess of E334 666.94 (three hundred and thirty four thousand six hundred and sixty six emalangeneni ninety four cents) being claimed by the appellant. They further referred to sections 32 (2) (a) and 32 (3) of the Retirement Funds Act No. 5 of 2005 as authority for the proposition that the second to the tenth respondents are entitled to make deductions from a member's benefit in order to make good any loss suffered by the employer. The section provides the following:

“32. (2) A retirement fund may deduct an amount from the member’s benefit in respect of:

(a) an amount representing the loss suffered by the employer due to any unlawful activity of the member and for which judgment has been obtained against the member in a Court or a written acknowledgement of culpability has been signed by the member and provided that the aforementioned written acknowledgement is witnessed by a person selected by the member and who has had not less than eight years of formal education.

32. (3) If for any reasons, except death, a member is unable or unwilling to acknowledge any debt contemplated in subsection (2) (a) then the employer shall apply to the Court for an Order authorising him to make a deduction from the member’s benefit up to an amount equal to the debt.”

[11] The first respondent also filed an Answering Affidavit in which he supported the submissions made by the third to the tenth respondents; it argued that the payment of the benefit to the appellant should be withheld pending the determination of Civil Case No. 3753/09. It further made various allegations of fraudulent transactions by the appellant which far exceeded the amount claimed by the appellant; the said allegations form the basis of the pending action.

[12] The first respondent further reiterated that sections 32 (2) (a) and 32 (3) allow the Retirement Fund represented by the second to the tenth respondents to make deductions from the benefits due to the appellant in order to make good

for the loss suffered by the employer. It denied that it instructed the Retirement Fund to stop processing the appellant's benefits; and, that it merely notified the Retirement Fund of the pending action against the appellant. It argued that it was the Retirement Fund which appropriately decided to withhold the payment of the appellant's benefits pending the outcome of the action. It further argued that the money owed by the appellant far exceeded the appellant's benefits, and, that the appellant would not have any other means of paying the amount stolen from the first respondent. Similarly, the eighth and ninth respondents deposed to supporting affidavits confirming the contents of the answering affidavit by the third to the tenth respondents.

[13] The appellant deposed to a replying affidavit denying that the third to the tenth respondents acted in terms of the Rules in withholding the withdrawal benefits; he reiterated that the Rules they cited only allow deductions where the Member has admitted liability to the employer or where judgment has been obtained against the member. The appellant argued that none of these conditions avail the third to the tenth respondents in the present matter.

[14] The trial Court held that the purpose of Rule B2.5.1 and section 32 (a) of the Retirement Funds Act is to compensate the employer for any loss suffered at the instance of the member; and, that in order to fulfil the purpose of these provisions, they should be interpreted to impliedly include the power to withhold payment of the benefit pending the determination of Court Case No.

3753/09 or acknowledgement of liability. The Court further held that the trustees exercised their discretion properly when they resolved to withhold payment pending the determination of the action.

[15] The Court further dismissed the appellant's contention that since the first respondent has not filed a declaration in the pending case, it had flouted the High Court Rules; and, that the action should be considered having been abandoned. The trial Court held that the appellant should either have filed a Notice of Bar or approached the High Court to have the matter dismissed. His Lordship dismissed the application with costs; hence, the appeal which has been brought before this Court. During the course of the hearing of the appeal, appellant's counsel withdrew the appeal in the midst of his submissions; this was before counsel for the respondents were invited to address the Court.

[16] In response to the withdrawal of the appeal, counsel for the respondents asked for costs of the appeal. Appellant's counsel did not tender the costs as expected in cases of withdrawal of appeals; his response was that he would leave the matter in the Court's hands. The question for determination before this Court is the payment of the costs of appeals. It is common cause that the trial Court granted costs in favour of the respondents. The withdrawal of the appeal was made during the hearing when the respondents had already been put out of pocket defending the appeal; hence, it is logical that the appellant should bear the costs of the appeal.

[17] Furthermore, the prospects of success on appeal were not good in light of the pending action between the first respondent and the appellant. The learned authors *Herbstein & Van Winsen* in their book entitled “The Civil Practice of the Supreme Court of South Africa” 5th edition Vol.1, Juta 2009 at page 310-311 state the following:

“*Lis Pendens*; where a plaintiff or an applicant, as the case may be, institutes proceedings against the same person and for the same cause of action arising from the same facts. The defendant/respondent as the case may be will usually successfully plead that the proceedings instituted against him be stayed pending finalization of the initial proceedings.”

[18] The purpose of Rule B2.5.1, Rule B2.5.2 and Rule B2.5.3 as well as section 32 (2) (a) of the Retirement Funds Act is to make good any loss suffered by an employer at the instance of a member. If the member is paid his benefits before any determination of the loss and possibly reimbursement, the employer would suffer irreparable harm unless the member has other assets at his disposal or has other sources of income. Section 32 (3) of the Retirement Funds Act allows the employer to apply to Court for an order authorising the deduction from the benefit. This is the purpose behind the pending matter.

[19] It is a trite principle of our law that an Appeal Court will not readily interfere with the exercise of the judicial discretion of a trial Court in awarding costs where there are grounds on which a Court acting reasonably could have come to that particular conclusion. The Appeal Court cannot interfere with the

exercise of the discretion merely because it might have taken a different view from that of the trial Court. However, the discretion of the trial Court is not without limits; the Court of Appeal could interfere if it can be shown that the Court *a quo* has exercised its discretion capriciously or upon a wrong principle, that it has not brought an unbiased judgment to bear to the question, or has not acted for substantial reasons: See *Neugebauer v. Hermann* 1923 AD 564 at 575; *Merber v. Merber* 1948 (1) SA 446 AD at 452-453; “The law of costs” by *A.C. Cilliers, Butterworths Publishers, Durban, 1972* at pages 301 – 304.

[20] The general principle applicable to awards of costs at first instance applies equally to awards of costs on appeal; the successful party should, as a general rule, be awarded his costs of appeal. The respondents did not only succeed in the Court *a quo* when the appellant’s application was dismissed but they have succeeded on appeal by means of the withdrawal of the appeal; the judgment of the Court *a quo* stands: see *Law of Costs (supra)* at pages 304-305.

[20.1] Generally, when determining costs on appeal, two competing principles should be observed. Firstly, that the Court of first instance exercises a judicial discretion in determining which of the parties should bear costs of suit. Secondly, that the successful party should, as a general rule, have his costs.

[20.2] As stated in the preceding paragraph, such a discretion is not unlimited but must be exercised judicially; this presupposes the existence of sufficient

grounds upon which the discretion is exercised. Where the court departs from the general rule, the grounds for such a departure should be clearly demonstrated. See the cases of *Fripp v. Gibbon and Company* 1913 AD 354 at 357; *Ritter v. Godfrey* (1920) 2 K.B. 47 at 60; *Merber v. Merber* (supra) at 452-453.

[21] Accordingly the following order is made:

[21.1] The appeal is hereby withdrawn at the appellant's instance.

[21.2] The appellant shall pay costs of the appeal.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree:

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree:

S.A. MOORE
JUSTICE OF APPEAL

FOR APPELLANT

Attorney B.S. Dlamini

FOR 1st & 2nd RESPONDENTS

Attorney M.M. Sibandze

FOR 3rd to 10th RESPONDENTS

Attorney K.J. Motsa

DELIVERED IN OPEN COURT ON 30th NOVEMBER 2012.