



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2412/2011

In the matter between:

KENNETH BHEKIZWE NGCAMPHALALA

Applicant

And

**SWAZILAND DEVELOPMENT AND
SAVINGS BANK**

Respondent

Neutral Citation: Kenneth Bhekizwe Ngcamphalala v Swaziland Development and Savings Bank 2412/2011 [2012] SZHC (14th September 2012)

Coram: M. Dlamini J.

Heard: 7th August 2012

Delivered: 14th September 2012

Interpretation of agreement by parties – court bound to give meaning to the language used by the parties – intention can only be inferred from the language used and not what was in the mind of each party.

Summary: The applicant instituted the present application claiming inter alia, interest accumulative following an award in his favour by the Industrial Court for an unfair dismissal which was confirmed by the Appeal Court.

[1] The background of the present application is that the applicant is a former employee of respondent. Having been dismissed by the respondent, applicant instituted proceedings at the Industrial Court, challenging his dismissal. Judgment was entered in his favour. Respondent appealed the decision of the Industrial Court. While the matter was pending at the appeal court, the applicant and respondent entered into an agreement which was reduced into writing. The agreement read as follows as evident at page 16 of the book of pleadings:

“The parties in the above matter have agreed that execution of the Court Order in case No. 26/2003 shall be stayed pending the determination of the appeal against the judgment of the Industrial Court dated 17th March 2005 in case No. 26/2003 subject to the following conditions.”

- 1) In the event that the applicant’s appeal is unsuccessful, the applicant shall be liable to pay interest on the judgment debt in Case No. 26/2003 at the rate of 9% per annum from date of judgment to date of payment.
- 2) The applicant shall diligently prepare and lodge the record of the proceedings on appeal without delay to ensure that the appeal may be heard at the next session of the Industrial Court of Appeal.
- 3) The agreement shall be made an order of court.

[2] This agreement was entered into on the 26th May, 2005. It was subsequently made an order of court at the Industrial Corut.

[3] The appeal court dismissed respondent's appeal and confirmed the Order of the court *a quo*. This entailed as per the agreement respondent paying the interest at the rate of 9% per annum. Respondent dully calculated the interest on a straight line and paid it over to applicant.

Present application

[4] The present application seeks to interpret clause 1 of the agreement. The applicant contends as follows at page 4 of the book of pleadings:

“(b) It is important to state that at paragraph 2 the memorandum of agreement provides that interest on the judgment debt will be calculated on a daily basis at 9% per annum.

c) The effect of adding the words “from date of judgment to date of payment” after 9% per annum has the effect of suggesting the method of interest calculated. In this regard interest is to be calculated cumulatively...

d) The respondent insist that adding these words has no effect and therefore decided to incorrectly calculate interest on a straight line method.”

[5] The award in favour of applicant appears in a judgment by Nkonyane A. J. as he then was dated 17th March 2005. The judgment only compels the respondent to pay applicant the sum of E264,516.00. There is no pronouncement on interest. The parties then agreed between themselves that should the respondent lose the appeal, the award would attract interest at the rate of 9% from the date of judgment to date of payment.

[6] As demonstrated above, applicant contends that the phrase “*date of judgment and date of payment*” connotes interest on a daily basis cumulative. In his submissions, Counsel for applicant reasoned that had applicant deposited the said sum into a special account, such would have earned interest upon interest. I am not sure which type of an account this would be, neither was it advanced by Counsel for respondent short of respondent suggesting an investment adventure which would on itself be precarious should the said capital be demanded before the period of investment lapses.

[7] In support of his contention, Counsel for respondent cited the case of **Central Africa Building Society v Perce N.O. 1969 (1) S.A. 445.**

[8] Applicant deposed as follows:

e) *It is my view that the respondent being a financial institute deliberately chose this cause of action merely to further frustrate applicant.*

f) *I say this because they themselves are in the business of making profits through interest margins and therefore they should know which method to use and when.”*

Insert at page 5:

[] In brief the applicant submits that the intention of clause 1 was cumulatively.

“his task was not to see that both parties really meant the same thing, but that both gave their assent to that proposition which, be it may, de facto arises out of the terms of their correspondence.”

[] Their Lordships in the same case (**Saambou**) were precise on the rationale:

*“As long as 1478 and in the context of sale, **Chief Justice Brian** proclaimed, “that the intent of a man cannot be tried, for the devil himself knows not the intent of a man.”*

[] Their Lordships in **Worman v Hughes and Others 1948 (3) S.A.495 at 505 (AD)** the interpretation of a term of a contract when they propounded:

“It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties’ intention was, but what the language used in the contract means, that is what their intention was as expressed in the contract.”

[] Fortiori, **Solomon J. in Pletsen v Henning 1993 A.D. 82 at 99** had stated:

“The intention of the parties must be gathered from their language, not from what either of them may have had in mind.”

- [] The *reason d’ etre* for the above *ratio decindi* is found in the case of **Saambou v Nasionale Bouverening v Friedman 1979 (3) S.A. 994** in a similarly issue of interpretation of the terms of contract where their Lordships cited Lord Eldon as having protested as follows:

Insert at page 10

- [] **Central Africa**, *supra* is very much akin to the issue *in casu* as it sought to interpret a provision of the legislation (Insolvency Act) on the question of interest. The learned judge, **Beadle C. J.** faced with the question where parties had expressly agreed that interest should be confounded , ruled that that in the light of the Insolvency Act, the intention of the parties wee to be excluded as the section did not include the wording *“unless otherwise lawfully stipulated in writing”* as other provisions of the Insolvency Act so outlined. The learned judge concluded that *“the plain meaning”* should be employed therefore.

- [] The learned judge in applying the ordinary meaning and thereby determining the method of calculating interest, stated at page 449F

“It seems to me, however, that section 88 (1) is not a subsection which is intended to deal with calculation of interest on claims at all. The sub-section which does this is section 88 (3) which provides that interest shall be calculated at the rate of 6 per centum per annum.”

- [] The learned judge explains the phrase *“at the rate of”* by stating as follows:

“It is a perfectly simple matter before the final distribution is made to calculate interest due on claims for any one particular period and thus at any particular time without the necessity of the knowing the date when the final repayment of capital will be made.” (words underlined my emphasis)

[] **Beadle C. J.** then demonstrates what would happen should the capital be paid in installments. He held that the installment would attract interest and when the balance is paid, similarly interest would be added.

[] From the analysis of the case and the different scenarios described by his Lordship Beadle, the phrase “interest at the rate of 6% per annum” is indicative that the capital amount whenever paid although the period is not ascertainable of the payment, attracts simple interest.

[] *“... applicant shall be liable to pay interest on the judgment debt in Case No.26/2003 at the rate of 9% per annum from date of judgment to date of payment”*

[] From the above it is clear that the parties’ intention was to be specific on the date of commencement of the period upon which interest was to start running viz. date of judgment which was 17th March 2005 as can be deduced from annexure B page 6 of the book of pleadings.

[] It was further to stop on the date of payment as one can read the words “to date of payment”. The words, “per annum” is indicative of the ratio to be used in calculating the interest. For instance, if the payment was made by respondent in June 2007, the interest would be 9% X 2 1/4 award.

- [] The ratio by his **Lordship Beadle** in **Central Africa** *supra* indicates therefore that the phrase “interest at the rate ofper *centum* per annum” should be given the ordinary meaning which is that interest should be calculated, to use applicant’s wording “*straight line*”.
- [] Had the parties so intended that the interest calculation should differ from the day to day computation, the parties would have so contracted as was the case in **Central Africa’s** case but for the insolvency of respondent company.
- [] Further, the wording so employed by the parties *in casu* is one used by our courts on a daily basis in granting judgment together with interest. The computation of an interest following similar wording as *in casu* is on a straight basis.
- [] To hold otherwise, would be contrary to the acceptable standard applicable in all matters where interest has been awarded. In other words, in the absence of express wording that interest shall be computed cumulatively, I cannot agree with the submission by applicant.
- [] The application therefore stands to fall.
- [] When this matter was first heard, respondent sought to have the matter dismissed on a point of law. However by judgment delivered on 18th June 2012, the point *in limine* was dismissed. No order as to costs was pronounced.

[] However, on the principle that costs follow the event, costs were to be awarded to the applicant on the 18th June 2012. Today costs are granted in favour of respondent. It follows therefore that there would be a set of in terms of costs. In the final analysis, each party is therefore ordered to pay its own costs.

M. DLAMINI
JUDGE

For Applicant : **Mr. S. C. Dlamini**

For Respondent : **Mr. S. Zikalala**

