IN THE HIGH COURT OF SWAZILAND

Held at Mbabane | Case No. 520/13

In the matter between:

RAPHAEL ELIAS BENE — **Applicant**

And

THE COMMISSIONER OF CORRECTIONAL SERVICES — **1st Respondent**

SWAZILAND GOVERNMENT — **2nd Respondent**

ATTORNEY GENERAL — **3rd Respondent**

PUBLIC SERVICE PENSION FUND — **4th Respondent**

Neutral citation: *Raphael Elias Bene vs The Commissioner of Correctional Services & 3 Others (520/13) 2016 SZHC 122(15th July 2016)*

Coram: Hlophe J

For the Applicant: Mr. T. Mamba

For the Respondent: Miss B. Shabalala

Date Heard: 06 July 2016

Date Handed Down: 15th July 2016

Summary

Declaratory Order sought – Applicant alleged that 1st Respondent unilaterally varied his employment terms to his prejudice – Applicant employed on a permanent and pensionable basis – His employment aforesaid starting with a two year probation followed by a confirmation after two years of probation which was itself followed by a promotion after 9 years of service – Applicant's terms and conditions unilaterally varied by first Respondent after 11 years of employment whereupon his initial employment was referred to as a mistake and his said employment was declared a nullity it being contended his status was a temporary employee – Applicant accepts the situation he was in at least by conduct and worked on short 3 year definite contracts for over 14 years – After serving last contract in 2010 Applicant seeks to challenge the decision that changed his status from Permanent and Pensionable to a contractual employee or a temporary employee as they called it – Whether in the circumstances applicant entitled to the declaratory order sought – Whether altering his employment status lawful in the circumstances – Whether given his having initially accepted the decision and having served as a contractual employee for 14 years since that decision was made, it was still open to him to challenge it thereafter – Clearly initial decision was acquiesced to or perempted – Consequently application cannot succeed and is dismissed with costs.

JUDGMENT

[1] The facts of the matter reveal that on the 1st July 1985, the Applicant, who it is not disputed was at the time a Mozambican National, was employed by the First Respondent as an officer specifically a Staff-Nurse in what was then known as the Swaziland Prisons Services and is now His Majesty's Correctional Services. This employment was by means of a written letter which spelt out the terms of the officer's engagement.

[2] It was made clear ex-facie the said letter that the Applicant's engagement, although on a Permanent and Pensionable basis, was to have its first two years served as a probationary period which was to be subject to a confirmation by the employer. It is not in dispute that at the end of the first two years in august 1987, the Applicant was indeed confirmed in line with the terms of the letter of appointment. In September 1994, the Applicant was promoted into the post of what was referred to as a Principal Officer. This letter of promotion paid a glowing tribute to the Applicant on the performance of his duties assuring him that the promotion bestowed on him was expected to motivate him so that he performed even better.

[3] The Applicant claims to have performed as a permanent employee until he became aware of a memorandum from his employer some 11 years later in January 1996 which stated that his hitherto appointment on a permanent and pensionable basis was a mistake and that his name had to be deleted from the register as he was supposedly employed on a temporary basis.

[4] How this was reacted to by the Applicant is unclear and the parties' versions differ. According to the Applicant he, whilst engaging the first Respondent, continued to work as a temporary or as a contractual employee. He said he continued working as such until he was given several three year contracts of service which would be renewed at the end of each such term. It is in fact the decision said to have been unilaterally taken by his employer in 1996, rendering him a temporary employee, that the Applicant now seeks to have it declared a nullity and/or reviewed.

[5] The Applicant continues otherwise to contend that he reached his retirement age from the first Respondent's employ in terms of the latter's polices in 1999 but continued working thereafter on the short term contracts until sometime in 2010 when he stopped working. It is obvious then he had long gone past the orthodox retirement age in that undertaking by some 11 years. He claims that because of the decision

varying his employment status in 1996, he lost out on his pensions as he was only paid his savings by the Public Service Pension Fund. He discloses having been informed that his employment status was changed from Permanent and Pensionable to a temporary one, because he was at that time a foreigner even though he managed to later regularize his status by becoming a Swazi in 2008 after he had khontaed or got naturalized.

[6] As indicated above, the Respondent's version differs from that of the Applicant from 1996 onwards. While it is admitted he was issued the memo or letter that changed the Applicant's employment status from Permanent and Pensionable to a Temporary or contractual one, he had allegedly continued working until he reached his retirement age of 60 years and beyond. In the meantime, it is said, measures to regularize or correct his position by addressing the prejudice that came with the decision were embarked upon. His status had to be changed because it had been discovered that he was a foreigner at the time of his employment, who allegedly could not lawfully permanently employed in Swaziland by an institution like the one that appointed him. When he reached his retirement age he could not be paid any pension except his own personal contributions to the Public Service Pension Fund as a full pension is payable only to permanent and pensionable employees who lawfully can only be Swazi or locals.

[7] In an attempt to ameliorate the harshness of the decision, taken against the Applicant, it was allegedly decided that the period that the Applicant had served in the First respondent's employment from the time of engagement to the time he left such employ, be converted into short term contracts of three years each, renewable at the end of each such contract until the last one in 2010. The upshot of this decision was the fact that the prejudice the Applicant was to suffer as engendered by the change in his initial employment status was addressed through the Applicant being paid a 30% gratuity at the end of each such fixed term contract. It was argued that this arrangement was so advantageous to the Applicant that it ended up better than that of a permanent and pensionable employee. It was contended further that because of these considerations, which Applicant had failed to challenge timeously, no prejudice had been occasioned him and that as it was factually correct that he was not a Swazi National at the time of his employment until his status changed in 2008, he was lawfully excluded from membership of the Public Service Pension Fund, and this necessitated that his application be dismissed.

[8] There are however, some curious events which occurred in this matter, which however it is clear and were confirmed to be so by all the parties, it is clear, did not have much of an impact on the circumstances of the

matter than just that they did occur and were indeed strange. In fact these are among others, the fact that notwithstanding that from inception the employment, confirmation and promotion of the Applicant as well as the variation of his status had all been done by the Swaziland Prison Services and now the Correctional Services authorities, there was on the 28th April 2008, written a letter by the Civil Service Commission to the Applicant purporting to be a response from a request by him. It said that the Civil Service Commission had varied his temporary Service as effected in 1996 by the First Respondent to pensionable status as staff nurse on Grade C5 effective from the 1st July 1985 to 15th May 1999 (that is from the year of his employment to that in which he would have retired had he remained a permanent and pensionable employee).

[9] Although none of the parties seemed to place much emphasis on the said letter, it is clear that it did not resolve anything but instead created more questions. This I say because it was only shortly thereafter and precisely on the 18th August 2009, that it was itself withdrawn by means of another letter which now advised Applicant that the variation of his terms from temporary to permanent as communicated to him previously (on the 28th April 2008), by the Civil Service Commission was being nullified.

[10] It was clarified during the argument or hearing of the matter that nothing much turned on these letters because the decision Applicant confirmed he was challenging albeit years later was that varying his initial terms of employment and status from being a Permanent and Pensionable employee to being a Temporary or ultimately an employee on contract and not the latter one which means that this latter one was accepted as correct and by implication that the one it sought to vary should never have been taken by the Civil Service Commission, possibly because it had no business interfering or being involved in such a matter.

[11] Although a certain point in limine was raised to the effect that this court had no jurisdiction to hear the matter at this stage because the dispute in question had not yet been taken for adjudication or determination in line with Section 43 of the Retirement Funds Act 5/2005, the said point could not be pursued but was expressly abandoned during the hearing of the matter thus paving a way for the determination of the matter in its merits as is the case in this judgment.

[12] It is clear from the papers filed of record and the argument raised during the hearing of the matter that according to the Applicant the issue is that the decision taken way back in 1996 (Annulling his permanent and pensionable status), was taken without the Applicant having been heard and that it was as a result of taking into consideration issues like the nationality of the Applicant which it was submitted should never have been taken. This it was argued, amounted to taking into account irrelevant considerations while failing to take into account the relevant ones. Based on these reasons, the Applicant sought to have the decision of the first Respondent, issued way back then declared a nullity and also reviewed and set aside.

[13] Whatever the merits or demerits of the decision concerned it cannot be denied that after its pronouncement it was not challenged until recently in these current proceedings which was done after some 14 or so years later after Applicant had enjoyed some benefits that came with the changed position. It seems to me that the thrust of the matter should realistically be more whether a decision spanning over so many years after its taking, particularly where after its pronouncement, the parties appear to have accepted it unequivocally to the extent of even acting in terms of it, can in

law be allowed to now turn around and challenge it after so long a time including all that would have happened around it as referred to above.

[14] For emphasis sake it is common cause that after the decision varying his status from a permanent and pensionable employee to a temporary one, the Applicant had accepted his fate and had acted on the said decision, working on the definite short term contracts until 2010 when he retired or stopped working. This means that Applicant had in law acquiesced to the decision. He had in fact accepted and enjoyed whatever benefit that came with the change. The benefit I am talking about in this regard is the 30% gratuity I am told he was to get at the end of each three year contract. The other obvious benefit was his having to remain in employment for 10 more years after he would have been forced to retire in 1999 in accordance with the First Respondent's employment conditions.

[15] The Applicant's conduct brought about what is known as acquiescence or preemption which is at times is referred to as blowing hot and cold or approbating and reprobating at the same time. At the heart of this principle is a party who whilst faced with two contrasting options unequivocally choses one such option over the other. The law prohibits

such a party from later turning around to take the option he had initially rejected if it is clear he had initially and unequivocally taken the other option. It is said in law he cannot accept and reject at the same time or put differently he cannot approbate and reprobate. In ***African Echo (PTY) LTD t/a Times of Swaziland and Others vs Inkhosatane Gelane Zwane Supreme Court Civil Appeal Case No. 77/2013 paragraph 47;*** the position was put as follows whilst quoting an excerpt from ***Hartley Roegshaan and Another vs First Rand Limited And Another Case No. 27612/2010:-***

> **"47 The doctrine of preemption was well enunciated in the case of *Hartley, Roegshaan and Another vs. First Rand Limited and Another (Supra)* where the court stated.**
>
> > **[13] According to the common law doctrine of peremption, a party who acquiesces to a judgment cannot subsequently seek to challenge the judgment to which he has acquiesced. This doctrine is founded on the logic that no person may be allowed to opportunistically endorsed two conflicting positions or to both approbate and reprobate, or to blow hot and cold. It may even be**

said that a party will not be allowed to have her cake and eat it too.

[14] The doctrine of preemption was enunciated in *Hlatshwayo vs mare and Deas (supra*) where Lord De Villiers held that "Where a man has two courses of action open to him and he unequivocally takes one he cannot afterwards turn back and take the other". Similarly in *Dabner vs South African Railways and Harbours (supra)* Javies CJ stated,

> **"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this court. If the conduct of an unsuccessful litigant is such that as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. In doubtful cases acquiescence, like waiver, must be held non-**

proven. See *Bhekiwe Vumile Hlophe vs Standard Bank of Swaziland, Court of Appeal Case No. 13/2005.”*

[16] As the Applicant had obviously accepted the decision varying his status from being a permanent employee to being a temporary or contractual employee to the extent of accepting the benefits that came with the altered status which happened over a longtime, he cannot be allowed to now purport to take the option he unequivocally rejected by his conduct some twenty years ago. If he were to be allowed to do that he would mean that he was being allowed to approbate and reprobate something that the law prohibits. See as well ***Dabner vs South African Railways and Harbours 1920 AD 583*** as well as ***Bhekiwe Vumile Hlophe vs Standard Bank of Swaziland Supreme Court Case No. 13/2005.***

[17] Whatever else may be said about the lawfulness or otherwise of the variation of the Applicant’s status at his work place coupled with whatever was subsequently done over the years as they ensued and whatever other resolution of this matter was attempted, it is clear that same cannot change the fact that Applicant accepted that decision and

had complied therewith ever since until after his contracts brought about by the change came to an end. This brings me to the inescapeable conclusion that Applicant's application cannot succeed. To this end this court makes the following order:-

1. The Applicant's application be and is hereby dismissed.

2. The Costs are to follow the event and are to be paid by the Applicant.

N. J. HLOPHE
JUDGE - HIGH COURT