

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 148/98

In the matter between:

JOSEPH DLAMINI (Deceased)

SUBSTITUTED BY JOEL DLAMINI (Curator)

APPLICANT

and

CARGO CARRIERS (PTY) LIMITED

RESPONDENT

CORAM:

NDERINDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR APPLICANT:

P. R. DUNSEITH

FOR RESPONDENT:

Z. JELE

JUDGEMENT

30/04/02

The Applicant Joseph Dlamini now deceased and substituted by Joel Dlamini in his capacity as curator of Applicant's estate was employed by the Respondent as a contracts controller on the 14th April, 1972.

He remained in continuous employment until the 1st February, 1997 when he alleges his services were terminated on grounds of ill health.

The Applicant brought the Application for unresolved dispute in terms of Section 65 of the repealed Industrial Relations Act¹ challenging the termination on grounds of illness on the basis that the doctor's certificate annexed to the Application indicated that the illness was controllable.

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The Commissioner of Labour was unable to resolve the dispute reported to him in terms of Section 57 of the Act 2 and he issued a certificate of unresolved dispute.

The Applicant claims payment for the five (5) years outstanding before he was due to retire in the sum of E196,740; 25 days salary in lieu of leave in the sum of E3,725; maximum compensation for unfair dismissal and pension from the Pension Fund.

It was conceded by Mr. Dunseith for the Applicant that the claim for 5 years salary was untenable and so was the claim for pension as the Pension Fund was managed by a different legal persona from the Respondent.

The following matters are common cause :

The particulars of Applicant's employment are not in dispute. That the Applicant was ill and was subjected to doctor's examination at the work place and by an external doctor in Nelspruit.

That the Applicant was paid a retrenchment package in the sum of E46/771 after he opted for it in preference to other options suggested to him by the Pension Fund Administrator Mrs, Lorraine Bendall. He too received terminal benefits.

That the medical officer at the Simunye clinic Dr. B.Z. Radebe had recommended early retirement on health grounds for the Applicant due to the frequent visitation by the Applicant to the clinic for hypertensive and diabetic condition.

That the medical officer referred him to a Dr N. J. Visagie in Nelspruit for a specialist opinion whereupon the Nelspruit doctor while suggesting that the Applicant's condition was controllable, recommended that he be placed on early retirement on the 16th September, 1996 subsequent to which the Simunye medical officer Dr. B.Z. Radebe recommended the early retirement on the 15th October, 1996.

It is also common knowledge that the Respondent took up the issue of early retirement on health grounds with the employee's pension fund in South Africa whereupon the Pension fund doctors declined to grant an application

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for early retirement package which would have meant a continued 70% salary pay to the Applicant until the date of his retirement but instead offered alternative options contained in a letter dated 9th December, 1997 subsequent to which the Applicant opted for a retrenchment package as of the 31st January, 1997.

What is in dispute is the circumstances which led to :

- (i) the recommendation for retirement on health grounds by Dr. Radebe.
- (ii) whether the Applicant voluntarily opted to remain at home while the application for the retirement on health grounds was being pursued with the employees' pension fund.
- (iii) whether the Respondent asked him to stay at home; and
- (iv) whether upon refusal by the Pension Fund to accept retirement of the Applicant on health grounds he asked the Respondent to take him back to work or infact the Respondent asked him to return to work but he declined and opted for the retrenchment package.

The versions by the Applicant and the Respondent on the issues in dispute is mutually destructive.

FACTS:

On the 17th October, 1996 Mr. Rocky Smith, Human Resources Manager wrote a memorandum to the Applicant referring to a discussion they had on the 10th October, 1996 with the intention to confirm the following :

1. That the Applicant will proceed on sick leave as from 14th October, 1996 to 10th November, 1996 with full pay.
2. That during the period, the Applicant will assist in completion of documentation for "possible" ill health retirement.

3. That on the 11th November, 1996 the Applicant was to report to work for discussion on future arrangements of payments whilst awaiting the outcome from the Pension Fund.

The Applicant was invited to contact the Respondent if he had any other concerns.

The Applicant did not respond to this memorandum.

This memorandum followed the recommendation by Dr. B. Z. Radebe on the 15th October, 1996 recommending that Applicant be placed on retirement on health grounds.

The Applicant's Application to retire on health grounds was rejected by the Pension Fund and Mr. Rocky Smith told the court that he informed the Applicant accordingly and told him he could come back to work as a transport controller but the Applicant declined stating that he was frequently in hospital at Simunye.

Mr. Smith requested a meeting with respondent's management to discuss the issue subsequent to which he wrote a letter to the management which we did not have advantage to see. The letter was written on the 28th November, 1996 and was responded to on the 1st December, 1996 by Mrs. Lorraine Bendall, Pensions Administrator of the Respondent stipulating the various options available to the Applicant. This was produced as exhibit 'A2'.

The options were then discussed with the Applicant and he opted for retrenchment as at 31st January, 1997 with a lump sum payment of E46,771.00

In addition, the Applicant was paid terminal benefits in terms of the Employment Act and he received a cheque in excess of E100,000.

Mr. Smith insisted that the offer of re-employment was made to the Applicant in the presence of his union representative Mr. Cyprian Dlamini but he opted for retrenchment option.

Subsequent to the meetings, Mr. Smith wrote a memorandum dated 27th February, 1997 to the Applicant in which he referred to two meetings held on the 24th and 26th February, 1997 with the Applicant.

The Applicant had in terms of the Memorandum expressed unhappiness with the unfair treatment from the company and considered that he had been unfairly dismissed.

Mr. Smith told the court that the Applicant was unhappy with the Pension Fund's rejection of his application for retrenchment on grounds of ill health which would have entitled him to better benefits than the retrenchment option he had taken. The Applicant according to Smith, declined to return to work, nonetheless.

The memorandum produced as "A3" appears to be a summarized record of what transpired in the discussions between the Applicant and the Respondent on the 24th and 26th February, 1997.

The Applicant denies the allegations by Mr. Smith that he had been requested to return to his work but had declined. He insisted that Mr. Rocky Smith told him that his position had been occupied by someone else and he could therefore not return to work.

He told the court that as soon as he learnt that the Pension Fund had rejected his application to be retired on grounds of ill health, he had expressed his wish to Mr. Smith to return to work to no avail.

The Applicant therefore states that he was unfairly dismissed by the Respondent. Mr. Smith denied vehemently that he dismissed the Applicant stating that exhibit 'A3' was self explanatory and he had

given it to the Applicant immediately after the discussions.

Mr. Smith added that once the Medical Board of Pensions Fund had ruled that the Applicant's condition was controllable it was open for the Respondent to take the Applicant back. He opted for the retrenchment package but was not retrenched prior to his taking this option.

The Applicant did not put any of the objections now alleged by him in writing at all, he however reported the matter to the Commissioner of Labour, several months after the alleged termination.

The Applicant has the onus to prove that his employment was terminated by the Respondent. Once that onus has been discharged it is for the Respondent

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to show that the dismissal was fair and in accordance with Section 36 of the Employment Act.

The Applicant said that it was not his intention to retire but the process was initiated by the Respondent. He explained that he did not know the contents of Dr. Radebe's letter.

It was submitted by Mr. Dunseith for the Applicant that the Applicant's version of events was detailed, consistent, and had a ring of truth about it. That he was unshaken under cross examination, and his version was more probable than that of the Respondent.

Mr. Dunseith admitted that DW2, Cyprian Dlamini's testimony was not satisfactory since he had little memory of what had transpired. He could not remember the sequence of events. This he said should not fault the Applicant's case as the events happened a long time ago and as Mr, Smith had told the court about twenty meetings took place on the issue.

Cyprian's testimony, Mr. Dunseith said confirmed Applicant's case in material respects that he wanted to return to work but the Respondent insisted that his place had been filled up.

The Applicant was a contracts controller between 1972 and 1997. He had only five (5) years to retirement age. He was a senior man and the court does not understand why if he had wanted to return to work after his application for retirement on the basis of ill health was rejected, he did not put his request in writing especially if Mr. Smith had declined to take him back and was desirous to take the matter up with the union and the Commissioner of Labour.

The Applicant did not object in writing to the assertions contained in exhibit 'A3" written to him by Mr. Smith alleging that he had requested not to return to his position after his disability claim was rejected by the Pension Fund.

It is inconceivable that Mr. Smith would have written the Memo 'A3" on the 27th February, 1997 after refusing to take the Applicant back because he had already filled up his position.

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Mr. Smith did not strike the court as a dishonest person, his explanation as to what happened was sensible, reasonable and probably true.

Mr. Smith's position was fortified by exhibits A1, A2 and A3 produced by the Applicant himself. The version told by the Applicant was inconsistent with exhibit "A3" which he did not respond to in writing at all.

No underlying reasons for the Respondent wanting to get rid of the Applicant was advanced by the Applicant. He had a good work record save for his constant visitations to hospital which did not impair his ability to work.

The court cannot read anything to the allegation by the Applicant that he had not initiated the retirement process himself. This appears to have been initiated by Dr. Radebe in his memorandum of the 15th October, 1996. There is no reason to doubt that the doctor's recommendation was done in good faith. The court cannot put much reliance on Cyprian Dlamini's testimony, as the same was inconsistent in material respects.

In the result, the Applicant has failed to prove that he was dismissed by the Respondent.

The Application fails in its entirety.

There will be no order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT