IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 500/05

In the matter between:

PUBLIC SERVICE PENSION FUND	**APPLICANT**
And	
WILSON DLAMINI	**1st RESPONDENT**
MR. NYATHI- DEPUTY SHERIFF	**2ND RESPONDENT**

CORAM:

NKOSINATHI NKONYANE :	**ACTING JUDGE**
GILBERT NDZINISA :	**MEMBER**
DAN MANGO:	**MEMBER**
FOR APPLICANT:	**MR. J. N. HLOPHE**
FOR 1st RESPONDENT :	**MR. J.M. MAVUSO**
FOR 2nd RESPONDENT:	**NO APPEARANCE**

R U L I N G 19.07.06

[1] This application was brought by the applicant against the respondents on an urgent basis for an order in the following terms;

> "1. Dispensing with the normal provisions of the rules of this Honourable Court as relate to form, service and time limits and hearing this matter as an urgent one.
>
> 2. Staying execution or further execution of the writ of execution dated the 12th December 2005 pending the outcome of this matter.

3. Declaring that the judgement of the Industrial Court, delivered on the 27th September 2002 has been fully satisfied by applicant through paying the sum of E145,933.00.

4. Declaring the writ of execution dated the 12th December 2005 a nullity and of no force or effect.

5. Directing that prayers 2, 3 & 4 hereinabove operate as a rule nisi with immediate and interim effect returnable on a date to be determined by the above Honourable Court.

6. Granting applicant the costs of this application.

7. Granting applicant any further or alternative relief."

[2] When the matter first came before the court, some preliminary points were raised. The court made its ruling on the points raised on 17.03.06. The application was finally argued on the merits on 13.06.06 and 26.06.06.

[3] The court will accordingly make a ruling on the main prayers being prayers 3 and 4. In terms of prayer 3 the applicant wants the court to make an order declaring that the judgement of this court delivered on the 27.09.02 has been fully satisfied as the applicant paid the sum of E145.933.00 the 1st respondent.

[4] Mr. Hlophe argued that the payment of the said sum of E145.933.00 to the 1st respondent was in full and final settlement of the judgement of the court.

[5] Mr. Mavuso argued to the contrary that there was never at any time an agreement that the payment of the said sum was payment in full and final settlement of the

judgement debt.

[6] In order to fully appreciate the basis of the arguments it is important to set out briefly the facts forming the basis of this application.

[7] The facts appear from the judgement of the late Judge, Justice Nkambule which was delivered on 27.09.02 under case No. 6/2001. The 1st respondent, who was then the applicant, had applied to the court to grant him two prayers. Prayer 1 was for an order for proper grading or notching of the position of administration manager by equating it with that of a similar organization, the Swaziland National Provident Fund (SNPF).

[8] Prayer 2 was for an order that the applicant receive the difference between what he was earning and what he could have earned had his salary been equated with that of the administration manager of SNPF. The court found in favour of the applicant (1st respondent herein). On page 4 of its judgement the court held as follows:-

"For the above reasons and conclusions the applicant's application succeeds. Respondent to pay applicant the amount reflected in the applicant's prayer

Respondent to further pay applicant a salary equivalent to the administration manager of the SNPF as reflected in annexure "B". This should be with effect from the payday of October 2002."

What is clear therefore is that there were two distinct prayers before the court, and the application was granted by the court.

Mr. Hlophe argued that the court when delivering its judgement did not grant the specific prayers sought by the 1st respondent, but the court used its discretion to make an order that the payment of the adjusted salary should be with effect from the payday

of October 2002.

From the submissions made before the court and from the papers filed in court, we are unable to agree with Mr. Hlophe. The evidence revealed that the 1st respondent filed an amended statement of claim, which contained the two prayers. In terms of paragraph 15 of the amended statement of claim, the 1st respondent averred that as the result of the discrimination in pay when compared to his counterpart at SNPF, he suffered prejudice in monetary terms amounting to E142,261.45 when calculated from 1st April 1998 to December 2000.

The writ of execution marked "PSP 4" was therefore sued out for the said amount of E142,261.45. There were no ambiguities as regards this amount.

The problem arose when the 1st respondent sued out the second writ for the sum of E163,427.04 marked "PSP9". This second writ led to the argument that it was out of order, as the parties had already settled the matter in full.

The court must therefore enquire whether there was indeed a full and final settlement of the matter. There was no documentary evidence to back this claim. The only documentary evidence referred in court was the letter marked "PSP5". PSP5" is a letter emanating from the applicant's attorney's office to the 1st respondent's attorney's office and is dated 19 September 2005. In paragraph 2 the writer thereof stated that:-

'We *confirm having clarified the basis of the cheque bearing the sum of E145,933.09 and that same was from client's point of view a payment in full and final settlement of all the monies due to your client from ours in terms of the judgement of the Industrial court."*

Mr. Mavuso denied that he at any time accepted the said amount as payment in full and final settlement. The burden to prove that there was an offer of compromise was on the applicant. There being no documentary evidence to that effect, we find that it

was highly unlikely that Mr. Mavuso could have orally accepted the offer on behalf of his client as a full and final settlement especially when one takes into account the amount of money involved. We therefore come to the conclusion that the applicant has failed to prove on a balance of probabilities that the 1st respondent was offered and accepted the sum of E145,933.09 as payment in full and final settlement of the judgement debt.

Further, the circumstances surrounding the payment of the cheque were not clear. The general rule is that sending of a cheque in full and final settlement of a debt amounts to an offer of compromise. It carries with it the implied condition that if the cheque is accepted, that is, banked the claim is settled. **(SEE AMLER'S PRECEDENTS OF PLEADINGS AT PAGE 305 AND THE CASES THEREIN CITED).**

In this case however, there was no evidence that when the sum of E145,933.00 was paid, the applicant indicated in a covering letter that it was in full and final settlement of the judgement debt, and that the 1st respondent knowing of that went ahead to bank it.

The second aspect of the applicant's application is contained in prayer 4. In that prayer the applicant seeks an order declaring the writ of execution dated 12.12.05 a nullity.

It was argued on behalf of the applicant that a writ can only be issued for a sum that is clear. It was further argued that the figure appearing therein was in dispute, as the calculations were not made to start in October 2002 as per the court order.

We are unable to agree with the applicant. The figure of E163,427.04 appearing on that writ was satisfactorily explained to the court. That figure was based on "R3" of the 1st respondent's Answering Affidavit. That document is also annexed to the Founding Affidavit, though it was not marked. It was annexed between documents "PSP6" and

"PSP7".

[21] Annexure "R3" clearly shows that the calculations are from October 2002. That is exactly what the court order said. The 1st respondent in its amended statement of claim had asked that the salary difference be calculated as from the 1st April 1998. The court, however, using its discretion ordered that the calculations should be as from the payday of October 2002.

[22] We therefore do not find any misdirection on the part of the 1st respondent.

[23] After having carefully considered the submissions made before the court and the totality of the evidence we are of the view that the application should be dismissed.

[24] The application is accordingly dismissed.

[25] No order for costs is made.

The members agree.

NKOSINATHI NKONYANE A.J.
INDUSTRIAL COURT