

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 326/01**

In the matter between:

**MONICA GROENING AND EIGHT OTHERS**

**APPLICANT**

And

**STANDARD BANK SWAZILAND LIMITED  
FORMERLY BARCLAYS BANK SWAZILAND**

**RESPONDENT**

**CORAM:**

**NKOSINATHINKONYANE :**

**JUDGE**

**DAN MANGO GILBERT**

**MEMBER**

**NDZINISA**

**MEMBER**

**FOR APPLICANT**

**FOR RESPONDENT**

**MR. N. MTHETHWA  
ADV. D. SMITH**

**JUDGEMENT 11/07/08**

[1]

The applicants in this matter are former employees of Barclays Bank which ceased to operate in the country and its operations

The applicants averred in their papers that they were retired by the respondent on grounds of ill-health. They claim that they were entitled to be paid severance allowances in terms of the provisions of **Section 34 of the Employment Act, 1980** upon their retirement. They also stated that on 17<sup>th</sup> February 2000, the respondent

expressly undertook in writing to pay them the severance allowances on or before 29<sup>th</sup> February 2000.

The applicants stated in their papers that the respondent, notwithstanding demand, failed and/or refused to pay them the severance allowances. The applicants then reported a dispute. The dispute could not be resolved, hence the present application for determination of an unresolved dispute.

The respondent is opposed to the application. In its reply to the applicants' application the respondent denied that it retired the applicants on grounds of ill-health. The respondent stated that the applicants requested that their services be terminated due to ill-health and the respondent agreed. In response to the averment by the applicants that the respondent undertook to pay them the severance allowances, the respondent stated that such was not an unconditional undertaking and that if it was, the author of the letter had no authority to make such an undertaking.

The respondent also stated in response to the issue of severance allowance that it was not obliged to pay this claim. It stated further that in terms of **Section 34 (4i) of the Employment Act**.

Section 34 (1), the employer is entitled to set-off the owing against the contribution made by the employee Pension Fund.

Four witnesses testified before the court on behalf of the applicants being Fortunate Dlamini, Grace Mpungose, Samuel Ntshangase, and the Secretary General of the applicants' union, Mr. Vincent Ncongwane. The respondent closed its case without calling any witness.

AW1 Fortunate Dlamini in chief told the court that during 1996 she was called by the operations Manager, Mr. Nhlanhla Kunene to his office where he told her that the bank had resolved that she should retire on medical grounds because she was a person who always absented herself from work.

AW1 said she was surprised to hear that and asked what she could do and Mr.

Kunene told her that she should write a letter to the Branch Manager and request to retire on medical grounds. AW1 accordingly wrote the letter. The letter appears on page 40 of Bundle "A". The process of retirement on medical grounds was

bank's doctor. Dr. R. S. Caithness. The doctor after examining AW1 indeed recommended that she be retired on medical grounds.

For some reasons the Managing Director Mr. W.G. Price was not for the idea that the applicant should retire on medical grounds.

At that period it seems that there was a voluntary exit scheme that, had been initiated by the bank. Mr. Price was of the view that she should take the voluntary exit package. AW1 denied that she applied for the voluntary exit package. She was at the end of it all retired on medical grounds by the bank. The letter of retirement is on page 42 of Bundle "A".

During cross-examination AW1 stated that she went to report her ease to the union for the first time when she received the letter from the bank's doctor. She said she went to the union because the bank's Human Resources Manager, Mr. Mario Masuku had lied and said she had applied for the voluntary exit package when she had not done so. She maintained that it was the Bank's Operations Manager who told her to retire on medical grounds.

AW2 Grace Mpungose in chief told the court that she was employed by Barclays Bank on 4<sup>th</sup> September 1973. She said whilst still in the employ of the bank her doctor discovered that she was diabetic. She then developed eye problems. Her eye doctor, Dr. Sanele Mabuza advised her to stay at home because of the eye problem and he wrote a letter to the bank. The doctor

addressed the letter to V\*ak Nibrahim; J Haf 'H: -<J.ih.-

Human Resources Manager. The Human Resources Manager then made an appointment for her with the bank's doctor, Dr. Stephens. She continued to go to work and she received a letter

from the bank that said she was being retired because of ill-health. This letter by the bank appears on page 39 of Bundle "A", AW2 said that she never applied to be retired on medical grounds. She

said she wrote a letter at the request of the Branch Manager that she understood what was being said by the doctor. That letter appears on page 38 of Bundle "A". AW2 said if the bank had not retired her on medical grounds she was not going to retire.

The evidence showed that although AW2 did not specifically ask her doctor to write to the bank and ask for retirement on medical grounds, she was however aware of what her doctor had written in that letter and she said she agreed with the contents. The cross-examination on this aspect went on as follows at pages 103-104 of the transcript;

**"RC: What was the relevance of giving that letter to your employer?"**

**A: The purpose of giving that letter to my employer was for him to see that I am a person who was ill.**

**RC: And that you were a person that was not fit to continue with employment. A: Yes my**

**Lord.**

**RC: And that you should be going on early retirement. A: Yes my Lord"**

**RC: Did you believe what Dr. Mabuza told you?**

**A: Yes my Lord.**

**RC: And you believed that you were unfit to continue with work?**

**A: That's the position my Lord.**

**RC: And you personally felt that you were unfit to go to work because you were not well. A: Yes my**

**Lord"**

This evidence became the basis of the respondent's argument that this witness was the one who wanted and in fact asked the respondent to retire her on grounds of ill-health.

AW3, Samuel Ntshangase in chief told the court that he was employed by Barclays

Bank as a driver and cleaner on 01.03.78. Whilst under the employ of the bank he got injured and was incapacitated from carrying on with his usual tasks. AW2 said he was attacked by thugs when he was on his way home from work. The thugs used a bush knife and hacked all his fingers on the left hand. He went to Hlathikhulu hospital for treatment.

When AW3 **felt** better, he reported back to work with a doctor's **letter** which **he** gave **to the employer** at Nhlangano Branch. He was then using one hand to carry out his duties. He said the employer noticed that he was not carrying out his duties properly and told him to go and see a doctor in Mbabane. The doctor examined him and told him that he could no longer be able to work. The doctor wrote a letter which he handed in at the Bank's headquarters in Mbabane. He said he did not see what was written in the letter as it was put inside an envelope. He said whilst working in Nhlangano, a decision came from Mbabane that he should retire from work. He said this information was

conveyed to him verbally'. AVV3 said he was not going to retire but he did so because the employer had said that he should retire.

During cross-examination AW 3 told the court that he did not request to retire on grounds of ill health and that this came from management. He agreed that he could no longer do the work that he used to do. He said he expected the bank to give him something else to do. AW3 said he did report to the union that there was some money due to him and asked the union to calculate all the benefits given to him to see if he had been properly paid. He said he is presently receiving a pension pay of E800.00 per month and that on retirement he was paid a sum of E26,541.00.

AW4 was Mr. Vincent Ncongwane, the Secretary-General of the applicants' union. The applicants reported their grievance to the union, the Swaziland Union of Financial Institutions and Allied Workers ("SUFIAW")- Mr. Ncongwane told the court in his evidence in-chief that he knows the applicants and that they were members of the union. He told the court that the applicants left the bank because they were retired on grounds of ill-health. He said the applicants approached the union after it had issued a notice that employees who have been retired on grounds

of ill-health should approach the union for whatever assistance that they may need.

Mr. Ncongwane said the union did assist the

118] Mr. Ncongwane told the court that the union was earlier on approached by another former employee of the bank by the name of Nelson Dlamini who was also retired by the bank on grounds of ill-health. The union engaged the bank on the issue of payment of severance allowance to this former employee. The bank did eventually pay out a sum in excess of E30.000:00. Mr. Ncongwane said that their negotiations with the bank in respect of the claim for severance allowance on behalf of the applicants, was premised on the understanding that as the bank had paid severance allowance to another former employee of the bank who was retired on grounds of ill-health, the applicants were therefore also entitled to be paid severance allowance.

[19] Mr. Ncongwane said the outcome of the negotiations was positive as the bank agreed to pay severance allowance to the applicants. Apart from the talks, the bank also committed itself by writing a letter to the union dated 17 February', 2000 where the bank stated that it was going to pay those who had not been paid on or before 29 February 2000. That letter appears on page 8 of Bundle "A".

[20] During cross-examination, Mr. Ncongwane's evidence in-chief that the union represented the applicants before the Commissioner of Labour during conciliation was not disputed. Mr. Ncongwane also confirmed that the certificate of unresolved dispute correctly reflected the nature of the dispute between the parties.

12 | i During submissions, on behalf of the respondent it was argued  
[ , ] that as regards Fortunate Dlamini and Grace Mpungose no evidence was led by them regarding the agreement to pay the severance allowance by the bank. It was argued that because of this, they cannot succeed with their claim based on the purported agreement by the bank. We do not agree with this submission. The evidence by Mr. Ncongwane revealed that the applicants reported to the union that they had not been paid severance allowance. The union then initiated the negotiations with the bank on this issue. During the negotiations the union was representing all the applicants and the bank agreed to pay the applicants the severance allowance. Although AW3 was not mentioned in the letter by the bank on

page 8 of Bundle "A", the authority of the union to represent all the applicants in the negotiations was never questioned in court, or during the negotiations with the bank or during the conciliation process before the Commissioner of Labour.

[22] The respondent closed its case without calling any witnesses. In its Reply, the respondent when responding to paragraph 8 of the applicants' application which deals with the bank's undertaking to pay the severance allowance, it stated that:

**"•Respondent states that this was not an unconditional undertaking to pay and that furthermore if it was, the author of the letter had no authority to make such an undertaking."**

No evidence was led in court that the agreement to pay the severance allowance was made in error or that the author thereof *had* no authority) to write that letter.

It was also argued on behalf of the respondent that the applicants cannot rely on an agreement before the court as there was never any dispute concerning an agreement that was reported to the Commissioner of Labour. This was clearly a casuistic argument. The certificate of unresolved dispute, clearly states what the issue before the Commissioner of Labour was, namely, payment of severance allowance. The Commissioner stated the dispute as follows on page 9 of Bundle "A" paragraph 4 (i);

**"The applicant union alleges that the respondent bank is refusing to pay severance allowance to members who were retired by Barclays Bank of Swaziland Limited, which was taken over by the respondent bank in 1997/"**

The bank was refusing to pay after it had made an undertaking to pay the severance allowance on or before 29 February 2000. The failure to use the word 'agreement' by the Commissioner does not mean that the dispute between the parties was not the one that related to the failure of the bank to honour the undertaking it had made on 17 February 2000 to pay the applicants severance allowance.

It was further argued on behalf of the respondent that the respondent was not legally bound to pay the severance allowance

to the applicant-. It was argued that in terms of Section 34(I) of the **Employment Act, 1980**, severance allowance is only to be paid by the employer where the employer was the one who

terminated the contract of employment other than under paragraphs (a) to (j) of **Section 36 of the Act.**

**Section 34 (1)** of the **Employment Act** states that;

**"Subject to subsections ((2) and (3) if the services of an employee are terminated by his employer other than under paragraphs (a) to (j) of Section 36 the employee shall be paid, as part of the benefits accruing under his contract of service, a severance allowance amounting to ten working days' wages for each completed year in excess of one year that has been continuously employed by that employer."**

Even if it can be argued by the respondent that the applicants are not entitled to be paid the severance allowance because they asked to be retired on medical grounds, there is still the undisputed evidence that the respondent nonetheless undertook or agreed to pay the severance allowance. A similar scenario was before in the case of **The Trustees of Swaziland Railway Gratuity Scheme V. Swaziland Transport and Allied Workers Union case no. 1442/93 (C.A.)**

In the above case Rule 8 of the Gratuity Scheme dealing with payment of gratuities provided that:

**"8. Payment of Gratuities**

**The following shall be entitled to a gratuity calculated under Rule 9:-**

**(a)~ (b)~**

**(c)~(d)-(e)-**

**(f) A member who is discharged from the service on the grounds of redundancy."**



The respondent in that case applied to the High Court for an order declaring that its 76 members who had been retrenched were entitled to a gratuity in terms of Rule 8 (f) referred to above. In opposition the applicant argued that the retrenched employees having been paid severance allowance in terms of **Section 34(1) of the Employment Act**, the applicant was entitled to set-off the amount of gratuity payable against the severance allowance. The **High Court** found in favour of the respondent union and held that the employees were entitled to payment of the gratuities due to them in terms of the scheme.(My underlining).

On appeal, the decision of the High Court was upheld. **Browde JA** held as follows on page 4 of the unreported judgement;

"... I agree **with** Sapire ACJ who said that the payment of the **gratuity is "an unequivocal contractual obligation undertaken** by the (appellant) which is unaffected by the provisions of Section 34 of the

**Employment Act'. The one has nothing to do with the other, the allowance is statutorily imposed, the gratuity is a contractual condition of employment."**

Similarly, in the present case the bank made an unequivocal undertaking to pay the severance allowance to the applicants. The court will not allow the respondent to run away from that undertaking by simply arguing that it is not obliged in terms of **Section 34 (1)** to pay the severance allowance.

The applicants under paragraph 6 of their application stated that;

**"6. The applicants were entitled to be paid a severance allowance in terms of the provisions of Section 34 of the Employment Act, 1980 upon their retirement on grounds of ill-health."**

To this averment the respondent replied as follows:

**"Ad paragraph 6**

**The contents herein are denied and respondent states that the applicants services were not terminated "by the employer" as contemplated by the Act. Accordingly severance does not fall due."**

Section 36 of the Employment Act lays down the grounds upon which it is fair for an employer to terminate the service of an employee. Paragraphs (a)-(j) are grounds which are attributable one way or another to dereliction of duty on the part of the employee. This does not apply to grounds (k)-(l). Grounds (k) - (l) read as follows:

**u(k) because the employee has attained the age which in the undertaking in which he was employed is the normal retiring age for employees holding the position that he held;**

**(l) because the employee is redundant."**

From these provisions it is clear that the legislature intended that employees who were terminated for reasons named in paragraphs (a)-(j) would not be paid severance allowance, and employees who were terminated for reasons stated in paragraphs (k)-(l) would be paid severance allowance.

The burden of proof that the applicants were terminated for a reason permitted by paragraphs (a)-(j) of Section 36 was on the respondent in terms of Section 42 (2) (a) of the Employment Act.

The evidence before the court clearly showed that their termination was in terms of paragraph (k), that is. their termination was effected by the respondent because they had reach the normal reHnng age. Although none of the applicants had reached the normal retiring age of sixty, they were deemed to have reached sixty years in terms of Rule 15 (c) of the respondent's staff Pension Fund Fades.

**Rule 15 (c) provides that;**

**"If an ill health pension is granted its amount will be calculated on the basis that the member had continued in the service of the Bank until his or her normal retirement age and his or her salary had meanwhile remained unaltered."**

The respondent's counsel argued passionately that the respondent did not terminate the applicants' services and that it was the applicants who requested to be retired on grounds of ill health. Even if it was to be accepted that some of the applicants asked to be retired on grounds of ill health, that did not detract from the fact that it was the respondent that finally effected the retirement of the applicants. The applicants did not resign.

Further, Section 36 states that;

**"It shall be fair for an employer to terminate the services of an employee for any of the following reasons -"**

The reasons are then listed from (a)-(H). So, it is clear in terms of the clear language of this section that whether an employee ceases to render his/her services to the employer because he/she is retrenched or has reached the normal retirement age, that does not detract from the fact that it was the respondent that finally effected the retirement of the applicants. The applicants did not resign.

The respondent itself, for example, wrote to AW3 Samuel Ntshangase

**"I am sorry to advise that due to ill-health, you have been retired from the Bank's service with effect from the 31<sup>st</sup> July 1996 ..."**

The court therefore will come to the conclusion that the applicants were terminated by the respondent on grounds of ill-health and that in terms of the respondent's Pension Fund Rules, they were deemed to have retired at the normal retirement age.

Secondly, the court also comes to the conclusion that the respondent having undertaken to pay the severance allowance to the applicants after the negotiations between it and the applicants' union, and there being no evidence tendered by the respondent as to why it should be legally allowed to resile from such undertaking, the respondent is bound by the undertaking.

Taking into account all the evidence before the court and also taking into account all the circumstances of the case the court will make the following order;

**1. That an order is granted in terms of prayers a) b) and c) of the applicants' application.**

The members agree.

**NKOSINATHI NKONYANE JI'DGE -  
INDUSTRIAL COURT**