

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 27/07

In the matter between:

GEORGE GREEN

Applicant

and

SWAZILAND RAILWAY

1ST Respondent

**ALEXANDER FORBES
FINANCIAL SERVICES**

2ND Respondent

In Re:

GEORGE GREEN

Applicant

and

SWAZILAND RAILWAY

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : N. NKOMONDE

FOR RESPONDENT : Z. JELE

J U D G E M E N T – 27/02/08

1. The Applicant has applied to the Industrial Court for an order:
 - ;
 - directing the Respondents to pay him his salary for December 2007;
 - ;
 - directing the 1st Respondent to pay him his vehicle allowance with effect from August 2007;
 - ;
 - costs on the attorney-client scale.
2. It is common cause that the Applicant is a longstanding employee of the 1st Respondent. He was injured in a work accident on 8th May 2005 and was thereafter medically certified as permanently incapacitated and disabled from performing his normal duties .
3. The Applicant applied for a medical retirement, but since he is due to reach normal retirement age on 23 December 2008 it was agreed between the parties that he should rather apply for a disablement income benefit in terms of the Rules of the Swaziland Railway Provident Fund ("the Fund").
4. In terms of such Rules, a member of the Fund who has been disabled for a period of 6 months becomes entitled to an income benefit equal to 50% of his "Fund Salary". Fund Salary is

defined in the Rules to mean *“the member’s basic annual salary or wages adjusted on a basis agreed from time to time between the Employer and the Member”*. The Rules provide further that the Fund Salary of a member in receipt of a Disablement Income Benefit shall be his Fund Salary at the date on which his disablement commenced.

5. The Disablement Income Benefit is payable at the end of each month to the disabled employee from the Fund, commencing on the last day of the month in which he becomes entitled to the Benefit. The employee is deemed to remain in the service of the 1st Respondent and payment of the Benefit ceases on (inter alia) his normal retirement date.
6. It is expressly provided in the Rules that the Fund shall not be liable to pay the benefit unless its claim for such benefit is admitted by its Registered Insurer, and furthermore the benefit shall be subject to such restrictions and conditions as may be imposed by the Registered Insurer.
7. On receipt of the Applicant’s application for the Disablement Income Benefit the 1st Respondent duly directed a claim for such benefit to its Registered Insurer, namely Momentum Collective Benefits. The claim was made through the 1st Respondent’s broker, the 2nd Respondent.

8. Momentum admitted the claim and agreed to pay the benefit to the Fund with effect from 1st August 2007.
9. The Applicant complains that with effect from 1st August 2007 the 1st Respondent stopped paying the vehicle allowance which he formerly received as part of his monthly remuneration. He also complains that the 1st Respondent failed to pay his salary for December 2007. When he enquired as to the reason for the non-payment, he was sent from pillar to post : the 1st Respondent said he must collect his benefit from the 2nd Respondent, whilst the 2nd Respondent referred him back to the 1st Respondent. It is for this reason that he has joined the 2nd Respondent as a party in these proceedings.
10. The Applicant is also aggrieved because the benefit (which he refers to as his "salary") is not paid into his bank account on the 15th day of each month, as is the case with the other employees of the 1st Respondent. Moreover he is not given any salary advice slip to explain how the amount paid to him is calculated.
11. The 1st Respondent has filed an Answering Affidavit and a Supplementary Answering Affidavit made by its Industrial Relations Manager Phindile Ginindza. Ms. Ginindza states that

after the court application was served on the 1st Respondent, a sum of E49,651-57 was paid to the Applicant in respect of *“the December salary together with other payments”*. No breakdown of the amount paid is volunteered, nor any explanation of the “other payments” referred to.

12. Ms Ginindza states that there was a delay with the processing of the benefits claim by the 2nd Respondent, and as a result the 1st Respondent took it upon itself to pay the Applicant’s salary from August to November 2007 from its own funds. Ms. Ginindza adds that *“there was initially some confusion as to how Momentum intended to pay the amount, with the 1st Respondent being initially of the view that the amount would be paid directly to the Applicant but it later transpired that the proper course was for the amount to be paid through the 1st Respondent”*.
13. The Disablement Income Benefit is governed by the Rules of the Swaziland Railway Provident Fund, which state in simple and straightforward language that the Benefit is payable to the disabled employee from the Fund – see Rule 6.5.3.1.
14. The Fund has chosen to take out insurance with Momentum to cover its liability for Disablement Income Benefit claims. This insurance is *res inter alios acta* - it has nothing to do with the Applicant, and there is no question of the Applicant having to look to the 1st Respondent’s insurers – let alone its brokers – for

payment of his monthly benefit.

15. Due to the delay in Momentum Collective Benefits processing reimbursement of the disability income benefit to the Fund, the first payment was only received from Momentum in December 2007. In the interim, the 1st Respondent paid the Applicant's salary during the period August – November 2007. According to salary advice slips furnished by the 1st Respondent, the Applicant was paid his full basic salary during this period. In October and November 2007 the basic salary amounted to E18,604.00 per month.
16. Ms Ginindza in her affidavit states that one of reasons for the delay in payment of the Applicant's December "salary" was a certain confusion as to whether he was to be paid fifty per cent or seventy five per cent of his basic salary. According to the Rules of the Fund he was entitled to fifty per cent of his Fund Salary, but Momentum Collective Benefits forwarded payment of seventy five per cent. The 1st Respondent wished to resolve this anomaly before they paid the benefits to the Applicant.
17. It subsequently transpired that Momentum had paid a seventy five per cent benefit in error, but to the good fortune of the Applicant the insurers agreed as an exception to continue with the seventy five per cent benefit. The confusion regarding the percentage benefit payable thus resulted in a financial windfall for the Applicant.

18. With regard to the alleged non-payment of the Applicant's December 2007 salary, the court makes the following findings:
- 18.1 the Applicant was entitled to be paid a disablement income benefit in December 2007, not a salary;
- 18.2 payment of the benefit is due on the last day of each month, according to the Rules of the Fund. The Fund may in its discretion elect to pay the benefit on an earlier date during the month. It appears to have elected to pay the Applicant on the normal pay date for employees of the 1st Respondent;
- 18.3 the 1st Respondent concedes that the benefit was paid a few days late in December 2007 and has given an explanation for the delay. In our view the explanation is bona fide and it was reasonable for the 1st Respondent to first clarify the position regarding the percentage of basic salary payable to the Applicant;
- 18.4 we accept the evidence of the 1st Respondent that the reasons for the delay in payment were communicated to the Applicant;
- 18.5 the 1st Respondent has not given any breakdown of

the sum of E49,651-57 paid on 20th December 2007. Nevertheless the amount is substantially in excess of seventy five per cent of the Applicant's basic salary and we accept that the benefit payable for December 2007 was included in this payment. We consider it disingenuous for the Applicant to assert that he has not been paid the benefit for December 2007 simply because he has not been given a breakdown of the sum of E49,651-57.

19. In the premises we find that the Applicant has been paid his disablement income benefit for December 2007.
20. On the issue of the vehicle allowance, the Rules of the Fund specifically define the benefit to which the Applicant is entitled whilst he is a disablement income beneficiary, namely a percentage of his Fund Salary. Fund Salary refers to his basic salary, and according to the salary advice slips filed of record the basic salary does not include the vehicle allowance.
21. The contributions paid by the Applicant to the Fund are calculated as a percentage of his basic salary excluding other allowances. It is consistent with logic and the Rules of the Fund that benefits expressed as a percentage of Fund Salary also refer to basic salary excluding other allowances. Ex facie the Rules of the Fund, the Applicant's disablement income benefit does not include his vehicle allowance or any percentage of such allowance.

22. The Applicant's counsel argues that the vehicle allowance is payable because:
- 22.1 it is a fringe benefit to which the Applicant is entitled in terms of his contract of employment; and
- 22.2 it is grossly unreasonable to deprive a disabled employee of his means of transport by stopping his vehicle allowance.
23. These arguments reveal a fundamental misunderstanding regarding the nature of the disablement income benefit. The effect of the disability scheme is that the Applicant's contract of employment is suspended. He is deemed to remain in the service of the 1st Respondent, but he is not required to render any employment services, nor is he entitled to any remuneration from his employer. Instead, he is paid a disablement income benefit by the Fund. The disability benefit ceases when the Applicant either dies, retires, or is certified as medically fit to resume his employment. In the latter event the suspension of the contract of employment terminates.
24. Until such time that the Applicant reaches normal retirement age, the 1st Respondent continues to contribute 12.5 per cent of his (full) Fund Salary to the Fund (see Rule 4.2.3). In addition the 1st Respondent is required to pay Applicant's member contribution (at the rate of 6 per cent of his (full) Fund Salary) to

the Fund (see Rule 4.1.2).

25. The obvious advantage of his admission to the disablement income benefit scheme is that the Applicant will on reaching normal retirement age receive the same pension he would have received if he had not been disabled and unable to work.

26. It is clear from this description of the operation of the disability scheme that the 1st Respondent has no legal liability to pay the Applicant's vehicle allowance so long as the Applicant is disabled and unable to tender his normal services. Moreover the 1st Respondent's Motor Vehicle Scheme expressly provides that the vehicle allowance is payable to eligible employees in order to provide vehicles and the use of vehicles to employees for the performance of their employment duties. Since the Applicant is not performing any employment duties for the 1st Respondent during the disability period, no contractual obligation to pay him the vehicle allowance arises in terms of the motor vehicle scheme.

27. It is unfortunate that the stoppage of the vehicle allowance may impact on the Applicant's capacity to finance his vehicle loan. This is a consequence of his application for admission to the disability income benefit scheme. The same consequence would have arisen if he had followed through on his request to be retired on medical grounds. Considerations *per misericordiam* do not however create legal liability.

28. The Applicant's application must fail. The only issue remaining is the question of costs. The Applicant seems to have been somewhat over-litigious in instituting urgent court proceedings to enforce payment of his December benefit when it was only four days overdue. An explanation had been given to him that there was an anomaly regarding the benefit percentage that needed to be resolved. At the same time, the 1st Respondent provoked a sense of insecurity by wrongly advising the Applicant that he should look to Momentum for payment. To compound the misunderstanding, 1st Respondent's attorney wrote a letter on 19 December 2007 giving an assurance that the December salary had been paid when this was not in fact the case. We do not attribute any *mala fides* or malice to the 1st Respondent as alleged by the Applicant, but we cannot find that the Applicant acted unreasonably in approaching the court for relief. In the final outcome however, the application is unsuccessful. The Applicant persisted in the litigation long after he received a payment far in excess of his December 2007 benefit. We are of the view that it is fair to direct that each party shall pay its own costs.

29. The application is dismissed. Each party is to pay its own costs.

The members agree.

P. R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT