

**IN THE INDUSTRIAL COURT OF SWAZILAND****HELD AT MBABANE****CASE NO. 524/08**

In the matter between:

**PHYLLIS PHUMZILE NTSHALINTSHALI****Applicant**

and

**SMALL ENTERPRISE DEVELOPMENT COMPANY****Respondent****CORAM:****P. R. DUNSEITH : PRESIDENT****JOSIAH YENDE : MEMBER****NICHOLAS MANANA : MEMBER****FOR APPLICANT : Z. JELE****FOR RESPONDENT : Z. SHABANGU**

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**J U D G E M E N T - 01/12/2008**

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1. The Applicant has applied to court for an order in the following terms:

- 1.1 Directing the Respondent to facilitate the reinstatement of the Applicant's pension in accordance with the judgment of the above Honourable Court as well as that of the Industrial Court of Appeal.

- 1.2 Directing that the Respondent take all necessary

steps to recover the amount paid by the Respondent to the Commissioner of Taxes, in order to facilitate compliance with Order No. 1 above.

1.3 That the above Honourable Court be and is hereby requested to interpret its judgement as well as that of the Industrial Court of Appeal with respect to the reinstatement of the Applicant's pension.

1.4 Costs of suit in the event that this application is opposed.

2. This application arises due to the parties being unable to agree on the effect of orders of the Industrial Court and Industrial Court of Appeal in previous proceedings relating to the reinstatement of the Applicant's pension benefits.

## BACKGROUND

3. The Respondent terminated the services of the Applicant as of 30<sup>th</sup> November 2003. The Applicant challenged the termination of her services and instituted proceedings in the Industrial Court in which she sought reinstatement to her employment.

4. At the close of the trial, judgment was entered in favour of the Applicant and the Industrial Court made the following order:

(a) The Respondent is ordered to reinstate the Applicant to her

position as Personnel Officer with effect from 1<sup>st</sup> December 2003, with full restoration of seniority, length of service and benefits.

- (b) The Respondent is ordered to pay to the Applicant the sum of E69,347.25 in respect of the balance of arrear remuneration after refund of terminal benefits.
- (c) The Respondent is ordered to pay to its Pension Fund for the credit of the Applicant the employer contributions for the period from 1<sup>st</sup> December 2003 to the date of reinstatement, and to procure that the Applicant is credited with all employer contributions paid to the Fund on her behalf prior to 1<sup>st</sup> December 2003 together with accrued interest to date.
- (d) The Respondent is ordered to pay the costs of the suit.

5. In its judgement, the court gave the following explanation for paragraph C of its order (supra):

“Regarding [the Applicant’s] pension, the Respondent is required to ensure that she receives full credit from the employer’s contributions from the date she became a member of the pension fund to the date of her reinstatement. The Applicant may retain the amount paid to her upon her retrenchment in respect of her own contributions to the pension fund plus interest and she will only be liable to re-commence her contributions from the date of her reinstatement.”

6. Unbeknown to the court when it delivered its judgement and ordered the Respondent “to procure that the Applicant is credited with all employer contributions paid to the Fund on her behalf prior to 1<sup>st</sup> December 2003 together with interest to date”, the Applicant had been paid a pension fund benefit inclusive of employer contributions consequent upon the termination of her services.

7. Paragraph C of the court order thus had the effect that the Respondent would be required to pay the employer pension contributions twice, and the Applicant would receive a double benefit to which she was not entitled.

8. Fortunately this anomaly was corrected on appeal. After dismissing the Respondent’s appeal against the order for reinstatement, the Industrial Court of Appeal held as follows:

*“On the issue of the pension monies, the Respondent [being the present Applicant] concedes that the judgement of the court a quo in so far as paragraph C of the order is concerned, was incorrect. The appropriate order is that the Respondent should repay the amounts paid to her as a pension at the time of termination of service, and the Appellant [being the present Respondent] is ordered to comply with paragraph C of the judgement. Therefore the judgement of the court a quo is altered to this extent.”*

**See Small Enterprise Development Company v Phyllis Phumzile Ntshalintshali (Unreported ICA Case No. 8/2007).**

9. Paragraph C of the Industrial Court order, as altered by the judgement of the Industrial Court of Appeal, consequently orders as

follows:

*“The Respondent is ordered to pay to its Pension Fund for the credit of the Applicant the employer contributions for the period from 1<sup>st</sup> December 2003 to the date of reinstatement. The Applicant is to repay to the Pension Fund the amount paid to her as a pension at the time of termination of her services, and the Respondent is to procure that the Applicant’s pension account with the Pension Fund is credited accordingly”.*

#### THE PRESENT DISPUTE

10. The present dispute with regard to reinstatement of the pension concerns the calculation of the employer contributions which the Respondents is required to pay to the Pension Fund for the credit of the Applicant, for the period from 1<sup>st</sup> December 2003 to date of reinstatement.
11. The parties agree that the contributions for the 30 month period from 1<sup>st</sup> December 2003 to 1<sup>st</sup> May 2006 should be based on the Applicant’s salary at date of termination increased by any increments awarded to employees during such period. The Respondent asserts that for the period from 1<sup>st</sup> May 2006 to the date of the reinstatement order (16 August 2007), the calculation of the employer’ contributions should not take into account any salary increments awarded during this period.
12. In support of its assertion the Respondent relies upon the following paragraph contained in the judgement of the Industrial Court:

“An order for reinstatement means that the employee is treated in all respects as if her services had never been terminated, and she is entitled to payment of remuneration from the date of termination to the date of reinstatement. We consider that it would be unduly harsh to require the Respondent to pay the Applicant the full arrear remuneration when it did not benefit from her services during this lengthy period, particularly because the Respondent cannot be held responsible for the delay in the case coming to trial. We consider that it would be fair and equitable for the Respondent to remunerate the Applicant for a period of 30 months from 1<sup>st</sup> December 2003 to 1<sup>st</sup> May 2006.”

13. The Respondent's counsel argues that because the court limited the back pay payable to the Applicant to this 30 month period, this means that the Applicant was not in the service of the Respondent from 1<sup>st</sup> May 2006 to the date of the reinstatement order and she is not entitled to the benefit of salary increments awarded during this period.
14. This argument cannot be sustained. The court ordered the reinstatement of the Applicant with effect from 1<sup>st</sup> December 2003, with full restoration of benefits. The court expressly stated in its judgement that an order for reinstatement means that the employee is treated in all respects as if her services had never been terminated. The fact that the court in the exercise of its equitable discretion, 'forgave' the Respondent from the full financial consequences of a reinstatement order in no way diminishes the entitlement of the Applicant to be treated as if her services had never been terminated. This means that she is entitled to the benefit of all salary increments awarded from the date of termination to the date of reinstatement, and

calculation of the pension contributions payable must take all such increments into account.

15. The other issue in dispute concerns the recovery of income tax which the Respondent deducted from the Applicant's terminal benefits and paid to the Commissioner of Taxes. The Respondent made such deduction in compliance with a tax directive it obtained from the Commissioner. Pursuant to the reinstatement order of the court, the Applicant has refunded to the Respondent the terminal benefits upon which she was taxed. She is entitled to a refund of the tax on such benefits.
16. The Applicant contends that the Respondent should recover the tax on her behalf, since it was the Respondent which deducted and remitted the tax in the first place, without the involvement of the Applicant.
17. The court is of the view that the Respondent acted as agent for the Commissioner of Taxes in recovering the tax on the terminal benefits paid to the Applicant. It is under no legal obligation to now act as agent for the Applicant in recovering such tax. The Applicant should herself apply to the Commissioner for a refund of tax paid.
18. The Respondent has expressed its willingness to assist in the recovery of the tax amount in a letter to the Applicant's attorney. The Respondent's counsel also stated in court that his client undertakes to facilitate recovery of the tax by making available to the Applicant all the relevant documentation pertaining to the tax directive, the deduction and the remittal of the tax amount. In our view this is the extent of the Respondent's obligation.

19. The court orders as follows:

- (a) The Respondent is directed to facilitate the reinstatement of the Applicant's pension in accordance with the judgment of the Industrial Court in Case No. 88/2004, as altered by the judgement of the Industrial Court of Appeal in Case No. 8/2007, and in accordance with the findings expressed in this judgement.**
  
- (b) We make no order as to costs.**

The members agree.

**PETER R. DUNSEITH  
PRESIDENT OF THE INDUSTRIAL COURT**