IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No.l 16/2020(D)

In the matter between:

MANDLENKOSI C. ZWANE Applicant

And

GOOD SHEPHERD MISSION HOSPITAL Respondent

In Re:

MANDLENKOSI C. ZWANE Applicant

And

GOOD SHEPHERD MISSION 1st Respondent

HOSPITAL KENNETH SIMELANE N.O. 2nd Respondent

Neutral Citation: Mandlenkosi C. Zwane vs. Good Shepherd Mission Hospital In re: Mandlenkosi C. Zwane vs. Good Shepherd Mission Hospital and Another (116/2020 (D) [2021] SZIC 94 (01 December 2021)

Coram: **V.Z. DLAMINI- ACTING JUDGE**
(Sitting with A. Nkambule and MT E Mtetwa - Nominated Members of the Court)

LAST HEARD: 07 September 2021

JUDGMENT DELIVERED: 01 December 2021

SUMMARY: Applicant instituted an application claiming gratuity and medical aid contributions ji·om the Respondent in terms of the provisions of the employment contract. Respondent opposed the application and contended that a subsequent offer by the Applicant which was unequivocally accepted by her culminated in a compromise agreement, which extinguished the terms of the initial contract of employment. Principles of offer and acceptance of the law of in contract considered.

HELD: On the facts, the Applicant's offer was rejected by the Respondent through a counter-offer, which was itself rejected by the Applicant by means of a fresh offer. Applicant entitled to payment of gratuity in terms of the provisions of the contract of employment, but obliged to reimburse the Respondent the salaries paid to him in error. Medical aid claim dismissed as no legal basis established.

JUDGEMENT

INTRODUCTION

[1] The Applicant is an adult liSwati male ofKaHlatsi area in the Shiselweni region who was employed by the Respondent on a three (3) year contract as Human Resources Manager on the 27th October 2017.

[2] The Respondent is a category A public enterprise and health institution duly established in terms of the laws ofEswatini, having its principal place of business in Siteki in the Lubombo region.

[3] In April 2020, the Respondent instituted a disciplinary process against the Applicant and during the course of that enquiry the parties were involved in litigation before the Court, which had been initiated by the Applicant apropos events that unfolded during the disciplinary process.

[4] Following the aforesaid litigation and while the disciplinary process was pending finalization, on the 6th August 2020 through his attorneys the Applicant made a written offer to the Respondent proposing that he be paid the remainder of his term and the parties part ways amicably. At the time of the offer, the Applicant was left with less than three (3) months before the expiry of his contract.

[5] On the 19th August 2020, the Respondent accepted the Applicant's offer and stated that it should be in full and final settlement of his employment contract; the Respondent subsequently paid three (3) months' salary to the Applicant and the employment contract was terminated. Other than the letters exchanged between the parties' attorneys conveying the offer and acceptance, no deed of settlement was signed encapsulating the terms of agreement.

[6] A dispute then ensued with respect to the exclusion of gratuity and medical aid as part of the benefits due to the Applicant at the termination of the contract. Despite demand by the Applicant for gratuity and medical aid, the Respondent refused to pay these benefits contending that by its acceptance of the Applicant's offer a new compromise agreement contract with distinct rights and obligations was created resulting in the novation of the original contract of employment with its terms.

[7] On the 4th December 2020, the Applicant filed an application to the Court seeking the following orders:

"1. Directing, ordering and compelling the Respondent to release to the Applicant gratuity, medical aid and pay-out.

2. Declaring that the Respondent's conduct of withholding the Applicant's gratuity and medical aid contribution unlawful and illegal.

Alternatively

3. Directing and compelling the Respondent to pay the Applicant his gratuity and medical aid contribution in terms of clause 4 and 5 of the Employment Contract.

4. Costs of suit at attorney and own client scale.

5. Such further and /or alternative remedy.

ARGUMENTS

APPLICANT

[8] The Applicant's counsel Mr. Magagula submitted that the Applicant was entitled to claim gratuity and medical aid contributions in terms of **Clauses 4** and **5** of contract of employment because the parties never concluded a compromise agreement in terms of which he waived his right to claim those benefits. According to counsel, the Applicant's offer that was made through annexure ***"MCZ 4"*** to the Founding Affidavit was never accepted by the Respondent so as to create a new agreement, instead the Respondent contended that it accepted the offer presented in annexure ***"MCZ 3";*** consequently, there was a mistake as to the nature of the contract that was concluded *(error in negotio).*

[9] On the principles of the law of contract in general and compromise agreement incorporating the phrase *"full and final settlement"*, Mr. Magagula referred the Court to the following authorities:

Simon Mbhamali v Teaching Service Commission and Others (13/15) [2016] SZIC 04; Kerr AJ: The Principles of the Law of Contract (2002); Patrick Magongo Ngwenya v Swazi Bank (679/2009) [2014] SZIC 14 and **Job Matsebula and Others v lntercon Construction (Pty) Ltd Case No 16/94.**

[10] Mr. Magagula further argued that since the Applicant's employment contract was terminated prior to its expiry date, in terms of **Clauses 4, 4.2** and **5** the Applicant was entitled to be paid gratuity at the rate of 25% of the annual basic salary per month and medical aid as benefits that accrued at the time of its termination. It was also contended by Mr. Magagula that while gratuity and severance allowance served the same purpose, the former was governed by contract whereas the latter was regulated by statute. In support of the aforegoing proposition, Counsel referred to the case **ofManana and Others v Acting President of the Industrial Court and Others (56/13) [2015] SZSC 14.**

[11] The Applicant's counsel furthered submitted that on account of the fact that the gratuity and medical aid benefits were contractual entitlements, withholding them was unlawful.

RESPONDENT

[12] The Respondent's counsel Mr. Manyatsi submitted that the question for decision by the Court was whether the consequences of the termination of the Applicant's employment contract was governed by the initial contract in annexure ***"MCZ 1"*** as alleged by the Applicant or by the compromise

agreement whose terms were encapsulated in annexures ***"MCZ 2"*** and ***"MCZ 3"*** respectively as claimed by the Respondent.

[13] According to Mr. Manyatsi, it was common cause that in order to avoid prolonged litigation emanating from the disciplinary proceedings, the parties entered into negotiations for purposes of reaching an amicable settlement of the Applicant's employment contract. Counsel further contended that the parties reached a compromise, which was first articulated clearly and unambiguously in an offer by Applicant in annexure ***"MCZ 2"*** and subsequently unequivocally accepted by the Respondent through annexure ***"MCZ 3".***

[14] The Respondent's counsel further elucidated that the terms of the compromise agreement entailed that the Applicant be paid the remaining three (3) months of his contract and that the parties part ways amicably. It was also argued by Mr. Manyatsi that the acceptance of the offer of compromise had the effect of novating and/or extinguishing the terms of the initial contract. On the exposition of what constituted a compromise agreement, Mr. Manyatsi referred the Court to the case of **Patrick Magongo Ngwenya v Swaziland Development and Savings Bank (04/2014) [2014] SZICA 03.**

[15] Mr. Manyatsi further submitted that it was a rigid and dogmatic approach to the principles of the formation of a contract for the Applicant to contend that for the compromise agreement to be valid, it ought to have been encapsulated in a signed Deed of Settlement as opposed to the letters of offer and acceptance respectively. Counsel added that the Applicant's contention was inconsistent with the trite principles of offer and acceptance of the law of contract. Exceptions only exist where the law prescribes certain formalities for execution of a contract. In support of the above proposition Counsel referred the Court to an extract of the learned

authors

Huyssteen .*et al* in their text **Contract: General Principles 5th edition (2016).**

(16] The Respondent's counsel further argued that the Applicant's claim for the medical aid contribution lacked merit as it was not founded in the initial contract of employment nor was it substantiated in his founding affidavit; consequently, for that reason alone without even considering the compromise agreement, that claim should fail.

[17] Mr. Manyatsi implored the Court to consider the unfair conduct of the Applicant who successfully negotiated a payout of his salary for the remaining three (3) months, which resulted in him avoiding the disciplinary hearing that might have led to his dismissal for misconduct culminating in forfeiture of the gratuity. Counsel added that by now resurfacing to claim gratuity, the Applicant hoodwinked the Respondent into believing that the offer was for purposes of settling the matter and the parties thereafter parting ways amicably.

[18] The Respondent's counsel therefore urged the Court to exercise its equitable jurisdiction in terms of **Section 4** of the **Industrial Relations Act, 2000 (as amended)** to promote fairness and equity in labour relations by dismissing the Applicant's claim for the latter's display of unfair conduct cited in paragraph 17 above.

ANALYSIS

[19] The Respondent's counsel correctly identified the issues for determination vexing the Court, which is whether the consequences of the termination of the Applicant's employment contract was governed by the initial contract as alleged by the Applicant or the compromise agreement as claimed by the Respondent.

[20] In determining the above issue, it behooves the Court to interpret the Applicant's offer in annexure ***"MCZ 2"*** and the Respondent's acceptance in annexure ***"MCZ 3".*** In our earlier ruling in the same matter where we dismissed preliminary points raised by the Respondent, we held that the interpretation of documents is a matter of law and therefore a question for the Court to decide as opposed to witnesses. We cited with approval the following authority and dictum:

KPMG Chartered Accountants (SA) v Securefin (644/07) [2009] ZASCA 7 at **paragraph 39,** where the Court said the following:

> "*... Second, interpretation is a matter of law and not fact and, accordingly interpretation is a matter for the court and not for witnesses (or as said in the common law jurisprudence, it is not a jury question) ...* "

[21] On account of the fact that the issue to be decided turns on the interpretation of the wording of annexures ***"MCZ 2"*** and ***"MCZ 3"*** this warrants the quotation of the contents thereof *verbatim.* The Applicant made the following offer per ***"MCZ* 2":**

> " *6th August 2020*
>
> *MANYATSI & ASSOCIATES*
>
> *Office no: 8, second floor*
>
> *Enguleni House*
>
> *Mahleka Street*
>
> *MANZJNJ*
>
> *Dear Sir,*

RE MANDLENKOSI C. ZWANE/GOOD SHEPHERD MISSION HOSPITAL

1. *Reference is made to the above matter herein.*
2. *You have raised an issue that our proposal was silent. As you may appreciate that our client is only left with three months before his contract lapse, our client proposes that yours pay him the remaining months and the parties part ways amicably.*
3. *We hope you will consider our proposal. Yours Faithfully*

SITHOLE & MAGAGULA ATTORNEYS"

[22] **The** Respondent responded to the offer per ***"MCZ 3"*** as follows:

" *19th August 2020*

SITHOLE & MAGAGULA Attorneys

6th Floor, Office No.69B

Mbandzeni House

Libandla Street

Mbabane

Dear Sir,

RE: MANDLENKOSI C. ZWANE!GOOD SHEPHERD MISSION HOSPITAL

1. *Your correspondence dated the 6th August 2020 refers.*
2. *We have taken instructions from our client regarding yours' offer. We are pleased to advise that our client accepts yours'*

offer

of settlement as contained in paragraph 2 of your correspondence dated the 6th August 2020.

3. *Therefore our client hereby accepts to pay your client salaries for the remaining three (3) months of his contract, in full and final settlement o(his employment contract and that the parties part ways amicably.*

Yours Faithfully

MANYATSI & ASSOCIATES" [Emphasis added].

[23] Two days after receiving ***"MCZ 3",*** the Applicant's attorneys wrote annexure ***"MCZ 4"*** to the Respondent's attorneys. Annexure ***"MCZ 4"*** reads as follows:

" *21st August 2020*

MANYATSI AND ASSOCIATES

CID MAKHOSI VILAKATI ATTORNEYS

2nd Floor, Office 204

Corporate Place, North Block

MBABANE

Dear Sir,

RE: MANDLENKOSI C. ZWANE/GOOD SHEPHERD MISSION HOSPITAL - INDUSTRIAL COURT OF ESWATINI - CASE NO:Il5/20

1. *Reference is made to the above matter herein.*

2. *We have taken instructions from client. Our client instructs us that he is happy that the matter is coming to an end. He therefore instructed us that, for the avoidance of doubt we record and sign a deed of settlement in the following terms,*

2.1 That, our client be paid the remaining three months salmy of his contract.

2.2 All leave days due as at 31st October 2020.

2.3 His pension (statutory benefit) his gratuity. 2.4 That a non-disclosure clause be included.

2.5 That the deed of settlement constitute a final and full settlement. Reference is made to the correspondence written to your client dated 17th July 2020 as annexed herein.

Yours Sincerely

SITHOLE & MAGAGULA ATTORNEYS

CC: MANDLENKOSI ZWANE. "

[24] Before considering contemporary rules of interpretation of document applied by the Courts, it is necessary for the Court to first and foremost make a pronouncement of the legal position regarding the validity of an offer that is accepted either by signing on its face or through a separate document in the absence of a signed memorandum of agreement.

[25] In the case of **Goodman Dlamini v Financial Services Regulatory Authority (229/2015) [2017] SZIC 20,** his Lordship Mazibuko J, (as he then was) said the following at paragraph 25:

"A contract comes into existence when an offer by one party is accepted by the other. A simple and helpful definition of a contract

is provided by Solomon Jin Watermeyer vs. Murray 1911 AD 61 at

page 70, when he states that: 'For every contract consist of an offer made by one party and accepted by the other"

[26] Regarding an offer and acceptance that creates a valid contract, the eminent scholar and learned author **GIBSON JTR: SOUTH AFRICAN MERCANTILE & COMPANY LAW 8th edition, Juta** & **Co., 2003** at pages 29 and 34 states that:

> *"An offer is a proposal that expresses a person's willingness to become a party to a contract, according to the terms expressed. Its acceptance by another person binds both of them contractually. To fulfil these requirements the offer must have the following attributes:*
>
> *(i) it must be consistent with all the essentials of a contract; and (ii) it must define all the terms on which agreement* is *sought .....Acceptance* is *the express or implied signification by the offeree of his intention to be contractually bound in terms of an offer made to him. In order that an acceptance should convert a valid offer into a contract the following requirements must be fulfilled: (i) it must be consistent with the essentials of contract; (ii) it must be unequivocal and in terms of the offer; (iii) it must be made in the manner, if any, prescribed by the offeror; and (iv) it must be made during the life of the offer."* [Our emphasis].

[27] It is therefore trite that except where the law or the offeror prescribes certain formalities for validity of the contract, there is no general requirement that a memorandum of agreement encompassing the terms of the offer and acceptance should be signed by the parties to create a legally binding contract.

[28] The contemporary principles of legal interpretation were espoused in the case of **Natal Joint Municipality Pension Fund v Endumeni**

Municipality (910/2010) [2012) ZASCA 13 (15 March 2012) at **paragraph 18** in the following terms:

> *"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the' context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statuto1y instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. "*

(29] Similar sentiments were expressed by the Court and Industrial Court of Appeal respectively in the following cases: **Magalela Ngwenya v National Agricultural Marketing Board (IC Case No. 59/2002); Martha Buyile Mdluli v The Swaziland Government & another (IC Case No. 304/2002)** and **Swaziland Nurses Association v Ministry of Public Service and Two Others (16/18) [2019] SZICA 02 (2nd May 2019).**

(30] When contrasting the words used in both annexures ***"MCZ 2"*** and ***"MCZ 3",*** we find a significant distinction. While the Respondent in ***"MCZ 3"*** unequivocally accepted the Applicant's offer that he be " *paid the remaining three (3) months of the contract and the parties part ways",* the Respondent added a condition that the payment of the remaining three (3) months should be *"in fall and final settlement of his employment contract".* The Applicant never expressly used those words nor can they be implied from ***"MCZ 2".*** It is probably for that reason that the Applicant replied through ***"MCZ 4"*** and clarified what terms in his view would constitute a *"final and full settlement"* of the matter.

(31J It is common cause that the context within which the offer was made was the protracted disciplinary hearing at a time when the Applicant was only left with three (3) months of his employment contract. Evidently from the contractual and factual background, both parties must have been aware of the following issues:

31.1 That in terms of the employment contract, the Applicant was entitled to gratuity whether or not the contract was terminated prior to its expiry date.

31.2 That the Applicant was not entitled to a salary he had not earned.

31.3 That they were uncertain that the disciplinary inquiry would be completed prior to the expiry of the contract by effluxion of time.

31.4 The possibility of an adverse or favourable outcome of the disciplinary hearing to the Applicant and the consequences to his claim for gratuity.

[32] In our view, the Respondent introduced the words *"in full and final settlement of his employment contract"* to avoid finding itself having to pay the Applicant a salary for remaining three months (not eamed) as well as the gratuity on the termination of the contract prior to its expiry date. **Clauses 4, 4.1** and **4.2** of the contract read as follows:

> *"TERMINATION OF CONTRACT PRIOR TO EXPIRY DATE*
>
> *It* is *specifically recorded that this agreement may be terminated at any tage prior to the expiry date of the' contract for misconduct, incapacity or the operational requirements of Good Shepherd Mission Hospital & College of Nursing or for any other reason justified in law.*
>
> *Should this agreement be lawjitlly terminated prior to the expiry date in terms of 4.1, the Employee shall be entitled to benefits accruing at the time of termination and to severance pay in terms of the Employment laws of Swaziland.* "

[33] The use of the phrase *"in full and final settlement"* during negotiations in the context of a dispute between parties has been explained by the Comis in a number of cases. In the case of **Patrick Magongo Ngwenya v Swaziland Development and Savings Bank (04/2014) [2014] SZICA 03,** at paragraph 18, the Industrial Court of Appeal observed as follows:

"It remains for us to say something on the concept of payment 'in full and final settlement' by a creditor in so far as the law of compromise is concerned. But first, it is necessary to bear in mind that a compromise itself is generally an agreement in terms of which the parties settle their dispute. This is usually an out-of-court settlement. A compromise creates new obligations and existing ones are extinguished. In effect, a compromise is a form of waiver or estoppel. Where payment is made in full and final settlement following a firm offer of compromise, then existing obligations fall away. In such a situation, the creditor is precluded from suing"

[34] In the case **ofDlarnini N.O. and others v Dlarnini and others (19/2005) SZSC** at pages 9-10, the Supreme Court remarked that:

"The use of the phrase 'in full and final settlement' has been the subject of discussion and determination in several cases decided in the South African Courts. What seems to be clear from the decisions to which I have been able to refer is that the phrase is correctly used, and is binding on the creditor, where it accompanies a tender in the form of compromise in an attempt to settle a dispute. By accepting the amount so tendered the creditor willingly abandons the balance of his claim. The matter is then settled and the creditor cannot pursue his original claim, But where there is no dispute, and each party believes that the correct amount has been paid and accepted, the words 'in full and final settlement' have no effect. If the creditor then discovers that he has not been paid the full amount due to him he can sue for the balance. "

[35] In the Court's view, if the words *"in full and final settlement of his*

employment contract" that were introduced by the Respondent in ***"MCZ 3"*** were accepted by the Applicant without additional terms in ***"MCZ 4",***

this would have resulted in the extinction of the latter's right to claim gratuity because the words" *settlement of his employment contract"* meant a waiver against claiming any benefits provided by the existing employment contract. This is clearly the position because both parties used the words *"and that the parties part ways amicably"* to signify an event that was to succeed the novation of the terms and conditions of the employment contract and payment of the remaining period.

[36] The introduction of the expression *"in full and final settlement of his employment contract"* by the Respondent in ***"MCZ 3",*** which was never mentioned by the Applicant in ***"MCZ 2"*** simultaneously constituted a rejection of the latter's offer and a counter-offer by the former. In **Wayne Parsons v Palfridge Limited t/a The Fridge Factory (475/2015) [2016) SZIC 09** at paragraphs 30 and 30.3, the Court said the following:

> *"The learned author, Gibson explains the principle of rejection as follows: 'The offer comes to an end if it is rejected by the offeree. Reiection can occur in two ways: either by an express reiection communicated to the offeror or by the making ofa counter-o(fer. In either case the reiection brings the offer to an end and it is no longer open for acceptance ....A classical case on the subject is that of Watermeyer vs. Murray 1911 AD 61. W offered to sell his farm to M W demanded a down payment on signing of the written*
>
> *agreement of sale. M counter-offered to make a down payment on a future date. Held per Solomon J· 'If then, the defendant's offer to sell on certain terms was rejected by the plaintiff making a counter offer to buy on different terms, it follows that the defendant's offer was no longer open for acceptance."*

[37] It bears emphasizing that the Applicant did not accept the Respondent's

counter-offer; instead he made a fresh offer, which he believed would

result in *"a final and full settlement"* of the ma.tter. This fresh offer included the payment of the remaining three months, leave pay and gratuity. The Court was not shown the Respondent's reply to the Applicant's fresh offer, but Mr. Manyatsi argued that the Applicant's fresh offer was inconsequential because it was made after the Respondent had accepted the Applicant's initial offer.

[38] For the avoidance of doubt, the Court finds that annexures ***"MCZ 2"*** and ***"MCZ 3"*** did not create an agreement because the Applicant's offer was rejected by the Respondent's counter-offer which was itself rejected through annexure ***"MCZ 4"*** by the Applicant. Despite the aforegoing, the Applicant was paid a salary for the remaining three months and the employment contract was terminated. The Court sought clarity from counsel as to when the payment was made and the contract terminated; no precise dates were proffered, but there is no doubt that both events occurred prior to the contract's expiry date.

[39) In the Court's view, since the Applicant's fresh offer was made two days after the Respondent's counter-offer, it may be reasonably inferred that the Respondent paid the Applicant for the remaining months with full knowledge that the Applicant had rejected the counter-offer. This may also be deduced from the fact that payment was not acknowledged in annexure ***"MCZ 4".*** We therefore find no merit in the Respondent's contention that the Applicant hoodwinked it.

[40] When the Applicant rejected the counter-offer, both parties were at liberty to withdraw from negotiations and continue with the disciplinary hearing to its finality. The fact that this never happened is a clear indication that what was paramount in the parties' minds was the mutual termination of the contract of employment; the only conundrum was the terms and conditions that would accompany that termination.

[41] Since the ***"MCZ 2"*** and ***"MCZ 3"*** never resulted in the extinction of the employment contract, when it was prematurely terminated albeit amicably, the provisions of **Clause 4** (quoted *verbatim* above) were activated. While **Clause 5 (Remuneration and Benefits)** makes provision for payment of gratuity at the rate of *"25% of annual basic salary per month.* "

[42] In the Court's view, **Clause 5** was not elegantly drafted. It does not specify the conditions under which gratuity would be paid. Notwithstanding that position, in the case of **National Union of Workers v. Scottish Ceylon Tea Co, Ltd NLR 133 of 78 [1975] LKHC 10,** the Court remarked that:

> *" ...In Independent Industrial & Commercial Employees Union v* C. *W.E (74 NLR 344) Justice Alles said: 'The word 'gratuity' is used in common parlance as a retirement benefit available for long and meritorious service rendered by the employee. A gratuity has now become a legitimate claim, which a workman can make ...and is intended to help a workman after his retirement, whether the retirement is due to the rules of superannuation or physical disability or otherwise. It is a benefit which an employee who has worked faithfully and loyally for his employer can look forward to in the evening of his life and which a generous and conscientious employer considers it just and equitable to offer for loyal and meritorious service ...A gratuity differs from a Provident Fund inasmuch as it is a benefit provided entirely by the employer, whereas a provident fund is one to which the employee himself contributes a part of his wages ...* "

[43] In the peculiar circumstances of this case, the Applicant was entitled to gratuity since the benefit was accruing at the time of the termination of the contract prior to its expiry date. The Court is loath to speculate

whether the Applicant would have been found guilty of the disciplinary charges leveled

against him. What matters is that the parties terminated the contract amicably prior to its expiry date.

[44] Even though the Respondent paid the Applicant after being aware that he rejected its counter-offer, the Applicant is liable to reimbursing the Respondent after rejecting the counter-offer. In exercising its equitable jurisdiction, the Court finds that a just and equitable resolution of the matter is for the Applicant to reimburse the Respondent the three (3) months' salary already paid in error.

(45] In the event the Applicant is unable to reimburse the Respondent, the latter will be entitled to set-off the salaries paid against the amount due to the Applicant as gratuity and the balance outstanding be paid over to the Applicant. The Court made a similar order, but on different facts in the case of **Phyllis Phumzile Ntshalintshali v Small Enterprise Development Company (IC Case No.88/2004).** In that case, the Court found that the termination of the Applicant's services on grounds of redundancy was substantively and procedurally unfair, but ordered reinstatement as oppose to awarding compensation. At paragraph 46, the Court said the following:

> *"The Applicant must refund the statutory terminal benefits paid to her by way of notice, additional notice and severance allowance. This amount is to be set-off against the remuneration payable to her ...* "

(46] Regarding the medical aid contribution claimed by the Applicant, there is no legal or factual basis to substantiate it. In terms of **Clause 5** of the employment contract, as part of the Applicant's remuneration and benefits the Respondent offered as follows: *"Medical Aid with Swazi Med fully paid by the employer".* The Applicant does not allege that the Respondent

breached this provision during the course of employment up to and including his last day of service. Put differently, the Applicant is not claiming for unpaid medical aid, but appears to be claiming it as a te1minal benefit.

[47] In terms of the contract, medical aid was due to the Applicant during his employment, when that service was terminated medical aid ceased to be an entitlement. Medical aid should not be confused with gratuity; the latter became due on termination while the former was due as part of the Applicant's gross salary. Even if the Applicant was claiming medical aid contribution for the remaining three (3) months, based on our finding that the salary was erroneously paid because annexures ***"MCZ 2"*** and ***"MCZ 3"*** never created any legal obligations, the Applicant would still not be entitled to medical aid for that period.

CONCLUSION

[48] We have found that the employment contract was never extinguished by armexures ***"MCZ 2"*** and ***"MCZ 3";*** consequently, on the termination of the contract prior to its expiry date, the Applicant was entitled to be paid gratuity in terms of **Clauses 4, 4.1, 4.2** and **5** of the contract. Nevertheless, the Applicant is obliged to reimburs the Respondent the salaries already paid in error.

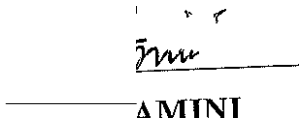
[49) In the result, the Court orders as follows:

[a] The Applicant's claim for gratuity succeeds. The Respondent is therefore directed to pay the Applicant gratuity in terms of **Clauses 4, 4.1, 4.2** and **5** of the contract of employment, but shall set-off the three (3) months salaries paid to the Applicant in error.

[b] The Applicant's claim for medical aid contribution is dismissed.

[c] Each party to pay its own costs.

The Members agree.



V.Z. DLAMINI

ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant: Mr. K.Q. Magagula
(Sithole & Magagula Attorneys)

For Respondent: Mr. L. Manyatsi
(Manyatsi & Associates)