



**IN THE INDUSTRIAL COURT OF ESWATINI**

HELD AT  
MBABANE

Case No: 398/2004

In the matter between:-

**TSAKASILE GLADYS KUNENE N.O**

APPLICANT

And

**[SWATINI RAILWAYS**

1<sup>st</sup> RESPONDENT

**THE MASTER OF THE HIGH**

2<sup>nd</sup> RESPONDENT

**COURT THE ATTORNEY GENERAL**

3<sup>rd</sup> RESPONDENT

**Neutral citation:** Tsakasile Gladys Kunene N.O v Eswatini Railways and 2 others  
(398 /2004)[2021] **SZrC** 98 (06 December 2021)

**Coram:** **MSIMANGO, ACTING JUDGE**

(Sitting with Mr S. Mvubu and Ms N. Dlamini nominated  
Members of the Court).

**Date Heard:** 04<sup>th</sup> NOVEMBER 2021

**Delivered:** 06<sup>th</sup> DECEMBER 2021

**Summary:** The Applicant's husband who is now deceased was employed by the 1<sup>st</sup> Respondent. He was involved in an accident whilst on duty in the year 1997 and was retired on medical grounds. He received his pay out from the 1<sup>st</sup> Respondent on the 29<sup>th</sup> May 2012 as per the judgement that was delivered by this Honourable court on the 2<sup>nd</sup> April 2012. The Applicant is of the view that the amount paid to his deceased husband was not the proper full amount as there was an error in its computation; hence the present application.

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## JUDGEMENT

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1. The Applicant is Tsakasile Gladys Kunene an adult Swati female widow, duly appointed executrix in the estate of the late Edward Jabulani Kunene.
2. The first Respondent is Eswatini Railways, a public entity with the capacity to sue and be sued in its own name, duly registered and incorporated in accordance with the company laws of Eswatini carrying business along Dzelewe Street, Mbabane in the Hhohho District.
3. The second Respondent is the Master of the High Court, the administrator of deceased estates in the country cited in her nominal capacity, whose address is Miller's Mansion, Mdada Street, Mbabane, Hhohho District.
4. The third Respondent is the Attorney General cited as the nominal Respondent and a legal advisor to all government departments, whose address is Fourth Floor,

Justice building, Usuthu Link Road Mbabane, Hhohho District. However, no order is sought against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

5. The Applicant alleges that he was lawfully married to Edward Jabulani Kunene until he passed on at the beginning of 2021. Furthermore, her husband was involved in an accident whilst on duty and the injuries led to his early retirement from work on medical grounds.
6. The deceased received a pay out from the 1<sup>st</sup> Respondent as per the judgement of this Honourable court, which ordered the 1<sup>st</sup> Respondent as follows:-
  - (a) That the Respondent pays the Applicant the amount of E1 94, 085.00.
  - (b) Interest at the rate of 9% per annum from 6<sup>th</sup> December 1997 to date of payment.
  - (c) Costs of suit.
7. In compliance with the judgement the 1<sup>st</sup> Respondent made a sum payment of E234,521.61 (Two hundred and thirty four thousand five hundred and twenty one emalangenis sixty cents) through cheque number 190993 dated 29<sup>th</sup> May 2012 directed to Edward Jabulani Kunene's former Attorneys S.P Mamba Attorneys.
8. The Applicant argues that the amount of E234, 521.61 was not the proper full amount as there was an error in its computation. By simple mathematical calculations the amount payable by the 29<sup>th</sup> May 2012 was E595, 025.20 (five hundred and ninety five thousand and twenty five emalangenis twenty cents) and not the sum of E234, 521.61. Deducting the sum of E234,521.61 from the amount of E595,025.20 which was owed and payable by 29<sup>th</sup> May 2012 gives an

outstanding balance of £360,503.59 (three hundred and sixty thousand, five hundred and three emalangen and fifty nine cents).

9. The Applicant alleges that the amount of £360,503.59 has now accumulated 9% interest over the years from 2012 to 2020, such that the total amount due, owing and payable by the 1<sup>st</sup> Respondent is £782,975.31 (seven hundred and eighty two thousand, nine hundred and seventy five emalangen thirty one cents).
10. The Applicant submitted that the judgement of the Honourable comi remains in force as it was not overturned nor reviewed, and by reason of its failure to pay as per the judgement, the 1<sup>st</sup> Respondent is liable to pay the amount of £782,975.31 together with interest at the rate of 9% per annum to final date of payment.
11. The 1<sup>st</sup> Respondent argued that there was a dispute relating to what the deceased was to be paid, and the dispute culminated to firstly an agreement for payment of a sum of £180,600.00 (one hundred and eighty thousand six hundred emalangen) and later litigation in this comi which gave rise to the judgement of the 2<sup>nd</sup> April 2012.
12. The payment of £180,600.00 was part payment of the money or claim that was in dispute and the balance thereof was to be settled after determination of the dispute by this comi.
13. At the time of conclusion of the agreement the deceased was represented by

Attorney P.R.Dunseith, hence the mutual understanding that the deceased be paid El 80, 600.00, so that he could continue supporting himself and paying his

monthly bills. If the court held that he was owed more than the aforementioned amount, then the shortfall was to be paid to him.

14. On the 2<sup>nd</sup> April 2012, the court held that the deceased was to be paid E194, 085.00 (one hundred and ninety four thousand eighty five emalangeni) plus 9% interest per annum and costs of suit.
15. The deceased through his Attorneys S.P. Mamba Attorneys was advised that he would be paid a further sum of E234, 521.61 (two hundred and thhiy four thousand five hundred and twenty one emalangeni sixty one cents) over and above the E1 80, 600.00 which he had received earlier on. The amount of E234, 521.61 was paid by cheque to deceased's Attorneys.
16. The 15' Respondent submitted that in line with the aforesaid calculations and payment to deceased's Attorneys, it fully satisfied its obligation in the judgement of this honourable court.
17. In this regard the 1<sup>st</sup> Respondent raised the following points of law:
  - (a) Incorrect interpretation of the judgement by the Applicant.
  - (b) Unreasonable delay in filing the present application.
  - (c) Doctrine of acquiescence- the Applicant and the deceased acquiesced with the calculations of the Attorneys and the judgement of the comi, they are now estopped from claiming that there are outstanding monies du.e to the estate.
18. The principles of the doctrine of acquiescence were canvassed in the case of **BOTHA V WHITE 2004 (3) S.A 184**, where the court stated:

*"The doctrine of acquiescence is competent to halt cases where its application is necessary to attain Just and equitable results. The test for inferred acquiescence is the impression created by the plaintiff or applicant on the defendant or respondent. It can be proven by some act, conduct or circumstances on the part of the plaintiff or applicant, for example, by the Applicant's delay in taking action, so that the respondent is lulled into a false sense of security. Then in such circumstances the enforcement of a right would cause a real inequity and the applicant's conduct in issue amount to unconscionable conduct".*

19. In **HARTLEY, ROEGSHAAN AND ANOTHER V FIRST RAND LIMITED AND ANOTHER**, HIGH COURT CASE NO. 27612/2010, the COU!i held that:

*"According to the common law doctrine of peremption a party who has acquiesce to a judgement cannot subsequently seek to challenge the judgement because he cannot be allowed to opportunistically endorse two conflicting positions or both approbate and reprobate, or to blow hot and cold. In other words a party cannot be allowed to have his cake and eat it too"*

20. In the present application it took the Applicant almost 9 years to file the application since the judgement was handed down in 2012. Fmihermore, the long or inordinate delay in filing the application is virtually and essentially unexplained. That this was attributable to the deceased maliciously cles1iing his matrimonial home at Matsetsa after receiving his pay out from the 1<sup>st</sup>

Respondent, and went to stay with his brother at Mbhuleni area in Matsapha, later re-uniting with his family in 2019, is in itself meaningless.

21. The reality of the matter is that the deceased was all along represented by Attorneys. The court does not for a moment believe that the Attorneys would not have advised the deceased whether to appeal or in any way challenge the judgement if the amount payable to the deceased was unacceptable. In the circumstance it is the court's considered view that all these factors point to a clear and settled intention to acquiesce to the judgement of the court.

22. In **DABNER V SOUTH AFRICAN RAILWAYS ANDHABOURS 1920 AD 583 AT 594**, it was noted that:

***"If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgement then he is held to have acquiesced to it....."***

23. In the result, the points of law raised by the pt Respondent are hereby upheld and the application is dismissed without costs.

The Members Agree.

**L.MSIMANGO**

**ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI**



For Applicant : Mr M.Nsibande. (Mongi Nsibande & Painers).

For Respondent : Mr S.M.Simelane (SM Simelane & Company)