

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

2020
Case No 213/2022

In the matter between:

PHILANI HLOPHE
And

Applicant

**WATER KAMHLABA UNITED WORLD COLLEGE
OF SOUTHERN AFRICA**

Respondent

Neutral citation: Philani Hlophe v Waterford KaMhlaba United World College of Southern Africa (213/20(b)) [2022] SZIC 70 (03 June, 2022)

Coram: **NGCAMPHALALA AJ**
(Sitting with Ms. Dlamini and Mr. D.P.M. Mmango,
Nominated Members of the Court)

Date Delivered: 3rd June, 2022

SUMMARY: Labour law-application proceedings-deduction of personal loan from Gratuity-points in limine raised by Respondent of dispute of facts-point in limine raised by Applicant on Respondent counter claim of dirty hands- interpretation of the of section 56(1)(d) &(e) of The Employment Act, 1980 – interpretation of provisions of section 32 (2)(a) & (b) of the Retirement Fund Act,2005.

Held – Deduction contrary to section 32 (1) (a) & (b) of The Retirement Fund Act-Application granted, no order as to costs.

JUDGMENT

- [1] The Applicant is Philani Hlophe an adult Liswati male of Mbabane in the District of Hhohho.
- [2] The Respondent is Waterford Kamhlaba United Colleague of Southern Africa, an educational institution registered in terms of the laws of Eswatini carrying on business at Waterford Park in Mbabane and has *locus standi in judicio* in this case.

BRIEF BACKGROUND

- [3] The Applicant is before Court seeking payment of his pro rata gratuity of sixty-four thousand six hundred and fifty-eight Emalangeni eighty-eight cents (E64,658.88), which the Applicant alleges is being unlawfully withheld by the Respondent pursuant to his dismissal by the Respondent. The Applicant has approached the Court by way of application after failing to reach a settlement with the Respondent at the Conciliation, Mediation, Arbitration Commission (CMAC).
- [4] The Applicant has now approached the Court on a normal application, seeking an order in the following terms:

4.1 That the Respondent be ordered and directed to pay the Applicant the following salary and employment benefits:

4.1.1 April 2020 salary and 13th Cheque totaling E24,350.06

4.1.2 Gratuity payment totaling E40,268.82

4.2 Costs at Attorney- client scale.

4.3 Further and/or alternative relief.

[5] The Applicants application is opposed by the Respondent and an Answering Affidavit was duly filed and deposed thereto by Mr. Leonard Bennett, Respondent's Human Resource Manager. The Applicant thereafter filed his Replying Affidavit. The matter came before Court on the 8th April, 2021 wherein the parties agreed on the filing of further pleadings and heads of agreement. The matter was then set down for argument on the 17th May, 2021, wherein judgment was reserved.

ANALYSIS OF FACTS AND APPLICABLE LAW

[6] Through the answering affidavit of Mr. Leonard Bennett the Respondent raised a point *in limine* of dispute of facts, whilst the Applicant in its replying affidavit in responded to the Respondents counter claim raised the doctrine of unclean hands.

- [7] As the parties agreed to deal with the matter holistically, the Applicant was the first to adduce evidence. Both parties did not dwell on the points *in limine* as raised in their papers and the Court will not deal with same, save to mention that the point *in limine* of dispute of facts does not arise herein. The issue in contention is the payment of a pro rata gratuity which amount is not disputed, and the issue raised as dispute of facts do not go to the heart of the matter.
- [8] The brief history on the matter, is that the Applicant was employed by the Respondent on the 1st September, 2019 on a fixed term contract of 36 months. It was his averment that he worked up until the 30th April, 2020 wherein the Respondent decided to terminate his contract of employment. It was his further averment that Clause 10 of his fixed term contract provided the following;
- “The employee shall also be entitled to gratuity equivalent to 25% of the basic salary, including any allowance noted in Section A of this Contract...”*
- [9] The Applicant stated that at the time of his employment he earned a monthly salary of twenty-five thousand four hundred and eighty-six Emalangeni and ninety-two cents (E25,486.76). The Respondent upon his dismissal rightly calculated his gratuity in the amount of Forty thousand two hundred and sixty-eight Emalangeni and seventy-six cents (E 40, 268. 76). It was further his averment that at the time of his dismissal he was owed his April salary together with his 13th Cheque. It Applicant submission that the Respondent has withheld his benefits unlawfully and without valid reason. Further that

there is no dispute relating to his entitlement of the benefits and salary, and there is no dispute on the quantum, therefore no dispute of facts arises.

[10] The Applicant submitted that despite being legally entitled to payment of the outstanding salary and benefits the Respondent has refused to pay the said amount. It was further his averment that the Respondent alleges that the withholding of his monies was due to outstanding staff loans that the Applicant had with the Respondent. Applicant argued that the withholding of his monies by the Respondent is wrong in law as the Respondent unilaterally took a decision to withhold his benefits without a Court order, or written consent from himself.

[11] It was his argument that the Respondent's action is tantamount to self-help. It was the Applicants claim that the action of the Respondent was not only unlawful but extremely insensitive and unfair. It was therefore his prayer that his application be granted and that the Respondent be ordered to pay costs at a punitive scale.

[12] In rebuttal it was the Respondent argument that there is a material dispute of fact which the Applicant should have foreseen. It was its averment that the Applicant agreed to repay the loan with his salary, and was given proper notice by the Respondent of its intention to deduct the said loan from his gratuity. It was Respondent's argument that the Applicant was not dismissed, however the Applicant was not confirmed in his employment after an

extended probational period. It was further its argument that the amount claimed by the Applicant were deducted from the Applicant in lieu of an outstanding balance of a staff loan that the Applicant took.

[13] It was Respondents submission that the loan was advanced at the Applicant's instance and request. The Applicant made the request to be advanced the loans, and further agreed that payment towards same would be done monthly through deductions that would be affected on his salary. The Respondent argued that the deductions to his gratuity was therefore done in terms of **Section 56(1) (d) of THE EMPLOYMENT ACT OF 1980**, and referred the Court to the case of **MBONO DLAMINI AND TWO OTHERS V THE MINISTRY OF ECONOMIC PLANNING AND DEVELOPMENT AND TWO OTHERS [2017] SZCIC 42**.

[14] The Respondent proceeded to raise a counter claim against the Applicant. It was the Respondents submission that the between the period of September, 2019 and March 2020, the Applicant was loaned and advanced staff loans amounting to Ninety-five thousand seven hundred Emalangi (E95, 750.00). This was done through a verbal agreement entered into between and the Applicant. At all material times the Applicant was aware that this amount was to be repaid by him.

[15] Respondent averred that the said amount became due and payable on the 30th March, 2020, on which date the Applicant was informed that he would not be confirmed. The Respondent after due notice proceeded to deduct the balance of the loan in repayment of the outstanding loan and a balance of Thirty-one thousand one hundred and thirty-one Emalangi and eighteen

cents (E31,131.18) remained outstanding. The amount is also now due, owing and payable and the Applicant is required to settle same in full.

[16] The law in our jurisdiction provides under section **56 (1) (D) of The Employment Act**, for the deduction of money loaned by an employer to an employee. The section provides:

*“An employer may deduct from the wages due to an employee....
(d) Any money advanced to the employee by the employer whether, paid directly to the employee or to another person at the employees written request, in anticipation of the regular period of payment of wages.”*

[17] It is common cause that the Respondent loaned an amount of Ninety-five thousand seven hundred Emalangenzi (E95, 750.00) to the Applicant which was payable on a monthly basis from the Applicants salary. It is also common cause that the issue for determination before Court, is not the lawfulness of the end of the Applicants contract of employment. But the issue before Court is to determine whether the withholding of the Applicants gratuity, pro rata 13th cheque and salary was done lawfully by the Respondent.

[18] As alluded to previously **section 56(1) (d)** provides for the deduction of monies owed to an employee, however same can only be done where consultations have taken place between the parties and the parties have agreed on such deductions. Whilst **The Retirement Fund Act, 2 ,2005 Section 32(2)** provides:

“A retirement fund may deduct an amount from its members benefits in respect of

(a) An amount representing the loss suffered by the employer due to unlawful activity of the member and for which judgment has been obtained against the member in a Court or written acknowledgment of culpability has been signed by the member and provided that the aforementioned written acknowledgment is witnessed by a person selected by the member and who has had no less than eight years of formal education.”

[19] Gratuity has been defined as,

“Gratuity is a part of a salary that is received by an employee from his employer in gratitude for the service offered by the employee in the company. It is a defined benefit plan and is one of many retirement benefits offered by the employer to the employee upon leaving his job.”

Clause 10 of the Applicants contract of employment provides that the Applicant shall be entitled to a gratuity equivalent to 25% of his basic salary.

(Emphasis on entitled). An entitlement has been defined by the **BLACK'S LAW DICTIONARY PAGE 573** as;

“An absolute right to a benefit ..., granted immediately upon meeting a legal requirement.”

[20] From the above legislation it is apparent that before a deduction is made on an employee's gratuity, there should be a judgment that has been obtained in a Court of law. Alternatively, there should be an acknowledgement by the employee acknowledging culpability. If the employee refuses to acknowledge any debt, the employer shall approach the High Court for an

order authorizing the deductions. **Section 32(2)(b) of The Retirement Fund Act** proceeds to provide for the second instance in which an employer may deduct from an employee's gratuity or pension it stipulates;

"An amount for which the employee is liable under a guarantee issued by the employer for purposes of obtaining a housing loan."

[21] From the evidence adduced it is evident that the Respondent has not complied with the provisions of **The Retirement Fund Act, 2005**, which specifically spells out the instances in which an employer may deduct outstanding loans it has with the employee, and the requirements it should meet. Further the Respondent has failed to furnish the Court with enough evidence that the Applicant was consulted or furnish the Court with an acknowledgement of debt. The loan given to the Applicant was of a personal nature and does not fall under the provisions of **Section 32 (2) (b)** nor has the Respondent met the requirements as spelt out in **Section 32(a) of the Act**. For the above reasons the Court is unable to reject the Applicant's version that he did not agree to the deduction of his personal loan from his gratuity, pro rata 13th cheque and last salary. The Applicant is therefore entitled to the order as sought.

[22] On the counterclaim the Respondent is advised to approach the High Court of Eswatini and seek redress for the said claim, as it is the appropriate Court in the circumstances, wherein a party refuses to acknowledge its culpability.

[23] On the last issue which is costs, it is trite law that an award for costs is a matter wholly within the discretion of the Court. It is a judicial discretion and

must be execute on grounds upon which a reasonable man could have come to the conclusion arrived at. The Court will consider the circumstances of each matter, weigh the various issues of the case, the conduct of the parties and any other circumstance which may have a bearing on the question of costs. The Court has considered all of the above, and finds the circumstances do not warrant the granting of a costs order at a punitive scale.

[24] In light of the above finding, the Court makes the following order.

1) Respondent is ordered to pay the Applicant:

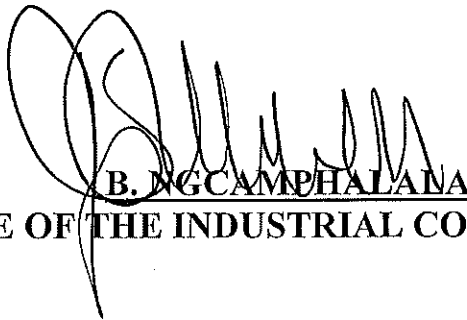
1.1 April 2020 salary and pro rata 13th cheque in the sum of E
24, 350.06

1.2 Gratuity in the sum of E40,268.76

TOTAL AMOUNT TO BE PAID E 64, 618.82

2) Each party is to bear its own costs.

The Members Agree.



B. NGCAMPHALANA

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT : Mr. S. Simelane (S.M. Simelane & Co)

FOR RESPONDENT : Mr. S. Kunene (KN Simelane Attorneys in
Association with Henwood & Company)