IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No.102/2020

In the matter between:

MONDAY DLAMINI 1st Applicant
GRACE PATEGUANA 2nd Applicant

And

INDUSTRIAL DEVELOPMENT COMPANY OF ESWATINI Respondent

Neutral Citation: Monday Dlamini and Another vs Industrial Development Company of Eswatini (102/2020) [2022] SZIC 75(16 June, 2022)

Coram: **MSIMANGO– ACTING JUDGE**
(Sitting with Mr. S. Mvubu and Mr. E.L.B. Dlamini – Nominated Members of the Court)

DATE HEARD: 22nd April, 2022

DATE DELIVERED: 16th June, 2022

SUMMARY: *The Applicants have brought an application to this Honourable Court seeking to be paid severance allowance by the Respondent following the termination of their employment by virtue of reaching their retirement age. They argue that the basis of this application is*

that retirement age at each workplace is set unilaterally by the employer without the consent of the employee. Hence, they view their retirement as a termination at the instance of the employer.

JUDGEMENT

---

[1] The 1st Applicant is Monday Msombuluko Dlamini an adult Liswati male, and former employee of the Respondent.

[2] The 2nd Respondent is Grace Pateguana an adult Liswati female, and former employee of the Respondent.

[3] The Respondent is Industrial Development Company of Eswatini, a company duly established in terms of the company laws of Eswatini and has the capacity to sue and be sued in its own name, with its principal place of business situated at 5th Floor, Dlanubeka Building Mbabane.

[4] The Applicants allege that prior to their retirement they approached the Respondent to enquire about payment of severance pay since they had a legitimate expectation arising from an established practice, that same is paid upon retirement, and also from that all employees who retired before them were duly paid their severance pay. However, they did not get a clear answer from the Respondent.

[5] The Swaziland Union of Financial Institutions and Allied Workers (SUFIAW) then took up the matter with the Respondent on behalf of the Applicants, and was duly advised that pursuant to the Judgement of

MAGDALENE THRING, the organisation has aligned itself with the position of the law stated therein, meaning the Respondent no longer pays severance allowance upon retirement.

[6] The Applicants submitted that the decision in the Thring case approaches the circumstances under which severance allowance is payable by an employer from an unreasonably fettered perspective, which is dismissal only. It totally disregards the other ways in which the employment relationship may be terminated.

[7] The Applicants submitted further that, the policy of the Respondent on retirement is that the retirement age is sixty (60) years. This age of retirement was not negotiated with them but a stipulation or policy provision of the employer. Hence, it is trite law that where retirement age is not agreed upon by and between the employer and employee, the termination of employment when an employee reaches the retirement age as unilaterally stipulated by the employer, is not termination by effluxion of time. It is clear termination of employment by virtue of a unilateral decision of the employer, being the Respondent herein.

[8] The Respondent is therefore liable to pay the severance allowance on the basis that, the date of the termination of employment and the age of termination was at the instance of the Respondent, it was neither termination by effluxion of time nor termination by the Applicants.

[9] The Respondent argued to the contrary that:-

9.1 The retirement age of all Respondent's employees is stipulated in its **Staff Regulations of September 1987,** wherein **regulation 26.01** specifically stipulates that Sixty (60) is the age of retirement. Further, when the Applicants and Respondent entered into an employment agreement, the Applicants were furnished with the Respondent's regulations, the Applicants were aware of the age of retirement at Respondent Company and/or ought to have reasonably known of the same. The Applicants accordingly consented to the age of retirement when the parties concluded the employment agreement.

9.2 Prior to 2015 the company paid out severance to retirees on the basis of a *bona fide*, but mistaken understanding of **Section 34(1) of the Employment Act No. 5/1980 as amended**, which was subsequently clarified by this Honourable Court in the Magdalene Thring Case. Employees who retired before June 2015 did receive payment of severance pay upon retirement. However, employees including the Applicants were advised that the Respondent would no longer pay retired employees severance pay through a memorandum dated 2nd June, 2015.

9.3 There was no retiring employee that was paid severance pay after the 2nd June 2015 to the extent that the Applicants allege that some of their retired colleagues were paid out even after the Magdalene case. Although the judgement was delivered on the 10th March, 2014, it only came to the Respondent's attention later and the company resolved to end the practice of paying retired employees severance allowance in June 2015. The only employee that was paid severance after the Magdalene judgement was Mayson Dlamini who retired around May 2014, before the judgement came to the attention of the Respondent.

9.4 Legitimate expectation only gives rise to procedural fairness, therefore the Applicants cannot rely on legitimate expectation on the basis that other employees before them were paid severance as that is an allegation of having a substantive right. If there was any right giving rise to a legitimate expectation on the basis of procedure it was unequivocally extinguished by the memorandum of the 2nd June, 2015.

9.5 In the Magdalene Violet Thring matter the Court held that retirement is not a termination by an employer, but an automatic act which comes about when an employee reaches the agreed retirement age. It was for that reason that severance allowances were to be payable in terms of the act only in instances where the termination of an employee's services is at the instance of an employer, of which retirement is clearly not.

[10] Based on the arguments made by the parties the Court now has to determine whether the Applicants are entitled to be paid severance pay on retirement.

[11] The Applicants' claim for payment of severance allowance is twofold, namely that:-

(a) They view their retirement as dismissal by the Respondent and argue that the Respondent unilaterally determined the retirement age and fixed it to be sixty (60) years.

(b) They had a legitimate expectation for payment of the severance allowance based on the fact that fellow employees who retired before them were paid.

[12] It is common cause that the Applicants retired respectively in February, 2018 and May 2019 when they reached sixty(60) years, being the retirement age at the Respondent's undertaking, as per **clause 26.01 of the Staff Regulations/Policy**, which provides as follows:-

"The employment of members of staff shall terminate in the following circumstances:-

On the member of staff obtaining the retirement age which shall be sixty (60) years of age, or as agreed in writing by the Board."

[13] It must be mentioned that it is imperative for an employer to have a provision in the contract of employment for the normal retirement age within the company. In the absence of any such provisions or policy, one may have to establish what the normal retirement age could be for the capacity which the employee serves. The *onus*, however, is on the employee to prove that he/she did not reach the normal or agreed retirement age in terms of the contract, policy or practice, then retiring an employee on this anticipated date is not considered a dismissal.

[14] *In casu* the Respondent has in place Staff regulations which also incorporate the retirement age for all employees. It is thus the Court's considered view that when the Applicants were hired they were made aware of the Regulations. By accepting the offer of employment the Applicants also accepted the retirement age as stipulated therein.

[15] Therefore in this regard the attaining of a normal or agreed retirement age is comparable to the situation of expiry of a term in the case of a fixed term of contract of employment. The point is that retirement age serves as a basis in itself for an employer to bring about the termination of the employment relationship without due process, and as such the retirement

provisions must be clear and unambigious. In other words retirement can be construed as a termination of the employee's contract by effluxion of time, therefore retirement does not constitute a dismissal.

[16] In **SCHAMAHMANN V THE CONCEPT COMMUNICATIONS NATAL (PTY) LTD 1997 18 ILJ 1333 LC,** an employee was retired by her employer on the due date. The employee then claimed payment of severance allowance, the Court stated the legal principle as follows:-

"When an employer and employee agree specifically or by implication retirement or normal retirement age in advance, that the effluxion of time is to operate as a guillotine which severs their employment relationship then it cannot be said that when this date arrives there has been a dismissal by the employer although the relationship and the contractual obligation are terminated."

[17] Furthermore, it is not a requirement that employees have to be consulted on, or that they have to agree to the retirement age as stipulated by the employer in the retirement policy. In principle an employer is entitled to unilaterally fix and then implement a normal retirement age. In **LYALL V CITY OF JOHANNESBURG (JS 171/2014) 2017 ZALC JHB,** the Court held that:-

"an employer is at liberty to unilaterally introduce a retirement age and act in accordance with the retirement age."

[18] The decisions of the Court in the above cited cases correctly state the law that when one reaches a retirement age the employment relationship terminates. This is so whether it is an agreed age or the normal retirement age.

[19] In our country the payment of severance allowance is governed by **Section 34(1)** read together with **Section 36 of the Employment Act No. 1 of 1980** as amended. **Section 34(1)** provides as follows:-

"……..If the services of an employee are terminated by his employer other than under paragraphs (a) to (j) of ***Section 36****, the employee shall be paid as part of the benefits accruing under his contract of service a severance allowance ……."*

[20] There are two (2) requirements in this Section that must be satisfied in order for an employee to claim severance allowance, namely:-

(a) the services of the employee must be terminated by the employer, and

(b) the termination must be for a reason other than that stated in paragraphs (a) to (j) of **Section 36 of the Act.**

[21] The Applicants have based their claim for payment of severance allowance on retirement. **Section 36** provides as follows in that regard:-

"It shall be fair for an employer to terminate the services of an employee for any of the following reasons:-

(a) ...
(b) ...
(c) ...
(d) ...
(e) ...
(f) ...
(g) ...
(h) ...

(i) ...

(j) ...

(k) because the employee has attained the age in which in the undertaking in which he was employed is the normal retiring age for employees holding the position that he held."

[22] This section creates an impression that when the services of an employee terminate on account of retirement, that termination amounts to a dismissal by the employer, albeit a fair dismissal. However, the Court in the case of **MAGDALENE VIOLET THRING V DUNNS SWAZILAND (ICA) Case No. 08/2013** clarified the position as follows:-

*"In so far as **Section 36 (k)** suggests that retirement, which is an independent and automatic act that comes about when an employee reaches the agreed age in an undertaking is termination by the employer. In its usual grammatical usage, retirement is not a termination by an employer but an automatic act which comes about when an employee reaches the agreed retirement age. It is for this reason that we are of the view that severance allowance will be payable in terms of the Act only in those instances where realistically the termination of an employee's services was at the instance of an employer, of which retirement is clearly not one."*

[23] The Court went on to state further that:-

*"It is a peremptory statutory requirement imposed by **Section 34(1) of the Employment Act** to determine at whose fault the termination of the said services came about. ....the section suggests that the said termination of*

an employee's services must not have been as a result of the employee's fault, but that of the employer for an employee to qualify to be paid severance allowance."

[24] The conclusion is inescapable that when an employee retires from work, the employment contract thereby terminates automatically or by effluxion of time. Even though a retirement has the effect of terminating the employment contract, it is not a dismissal.

[25] The Courts as well as the learned authors have further set out the purpose for the payment of severance allowance as follows:-

"Severance pay is a form of compensation that an employee receives when they are let go by a company. In other words, it is money or benefits that an employer pays an employee who loses their job through no fault of their own. It is meant to cushion the blow of unemployment and also deter employers from resorting to dismissals lightly." ***JOHN GROGAN WORKPLACE LAW, 10TH EDITION, 2009 (JUTA & CO)***

[26] In **ROGERS V EXACTOCRAFT (PTY) LTD (C1142/10) ZALCCT16**, the Court held that:-

"an employee who received retirement benefits could also not obtain severance pay .....severance pay is for an unexpected termination of one's expectations..."

[27] This Court respectfully agrees with the principle as stated in the authorities cited above. The legal position is clear that severance allowance is not

payable to retiring employees for the reason that this termination of employment is not at the instance of the employer, but rather due to effluxion of time. That being the case, it cannot be said that the employee has been dismissed by the employer.

[28] The Applicants further argued that they had a legitimate expectation to be paid severance allowance by virtue of their colleagues who were paid their severance allowance upon retirement, which was an established consistent practice at the Respondent's undertaking.

[29] The Respondent submitted to the contrary that any right giving rise to a legitimate expectation was unequivocally extinguished by a memorandum dated 2nd June 2015 addressed to all employees of the Respondent, which reads as follows:-

TO : ALL STAFF

CC : ACTING CEO

FROM : REMCO

DATE : 02/06/2015

RE : PAYMENT OF TERMINAL BENEFITS (SEVERANCE)

This memo is to shed some light with regards to payment of termination benefits, vis, severance and additional notice pay on top of the provident fund withdrawal, whether or not an employee who has reached retirement age is entitled to them.

It has been a practice since time immemorial that all these benefits were paid to a retiree by SIDC. It is understandable as the law in terms of

***Section 34**, read together with **Section 36 of the Employment Act** stipulates that we should pay severance as it envisages that the termination is at the instance of the employer-dismissal.*

*However, a recent Court judgement **THRING V DUNNS- INDUSTRIAL COURT CASE 2013** states that where an employee retires from work, the employment contract thereby terminates automatically or by effluxion of time. Even though the retirement has the effect of the termination of employment, it is not a dismissal.*

*The Court in this case continued to note that when the legislature (parliament) drafted **Section 34(1)** as read together with **Section 36(k) of the Act**, they had in mind a situation where the services of an employee are terminated by the employer prematurely, under the guise that the employee has retired. The legislature saw a need to protect the employees against forced or premature retirement.*

It is noted that both these Sections, read together are somewhat confusing. The statute creates an impression that when the services of an employee terminate on account of retirement, that termination amounts to a dismissal by the employer, albeit a fair dismissal. That thinking is inconsistent with the position expressed by the Courts.

By this MEMORANDUM, SIDC management and employees are advised that from the 1st of June, this practice of payment of severance allowance and Additional Notice shall be done away with.

[29] The Respondent submitted further that as a result of this memorandum there was no retiring employee who was paid out severance allowance after the 2nd June 2015, to the extent that the Applicants allege that some of their retired colleagues were paid out even after the Magdalene case. The company resolved to end the practice of paying retired employees

severance in June 2015. All employees including the Applicants were informed of the resolution.

[30] Based on the Applicants reliance on the doctrine of legitimate expectation it must be pointed out that legitimate expectation is not a legal right, it is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The expectation should be legitimate, reasonable, logical and valid. Not being a right, it is not enforceable as such. It is a concept fashioned by Courts for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action.

[31] These sentiments were expressed by the Court in the case of **NHLANHLA HLATSHWAYO V SWAZILAND GOVERNMENT IC CASE NO. 398/06,** where it was held that:-

".....with regard to the Applicant's reliance on the doctrine of legitimate expectation, there is no legal precedent in Swaziland where substantive rights have been accorded on the basis of legitimate expectation. The legitimate expectation doctrine in our law only gives rise to a right to a fair hearing before an adverse decision is taken..... To be legitimate an expectation must have some reasonable basis, it must be more than a mere hope or ambition.."

[32] The *onus* is on the employee to prove the existence of a legitimate expectation. He/she does so by placing evidence that there are circumstances which justify such expectation. *In casu* it is common cause that the Respondent ended the practice of paying severance allowance to retiring employees in June 2015, furthermore, all employees including the Applicants were informed of this decision. It is therefore inconceivable how the Applicants would have had a legitimate

expectation since they were made aware of the decision. Any expectation created was diminished in 2015.

[33] In **SA RUGBY PLAYER ASSOCIATION V SA RUGBY (PTY) LTD 2008 29 ILJ 2218 (LAC),** the Labour Appeal Court found that employees could not rely on a statement by a coach that the players would have a further contract when he was shortly thereafter removed and replaced by a different coach. Any expectation created should have been diminished when the former coach's contract was terminated.

[34] Taking into account all the foregoing, the Court accordingly makes the following order:

(i) The application is hereby dismissed.

(ii) Each party to pay its own costs.

One Member agrees, the other member does not.

L. MSIMANGO

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANTS: Mr. M. Ndlangamandla
(MLK Ndlangamandla Attorneys)

FOR RESPONDENT: Mr. M. Sibandze
(Musa M. Sibandze Attorneys)