



IN THE INDUSTRIAL COURT OF SWAZILAND

Case No 376/2022

In the matter between:

MBHEKENI SIHLONGONYANE

Applicant

And

ESWATINI HOUSING BOARD

Respondent

Neutral citation: Mbhekeni Sihlongoyane v Eswatini Housing Board [2022]
(376/2022) [2023] SZIC 36 (26 April, 2023)

Coram: **NGCAMPHALALA AJ**
*(Sitting with Mr. E.L.B. Dlamini and Mr. M.P. Dlamini
Nominated Members of the Court)*

DATE HEARD: 23rd March, 2023

DATE DELIVERED: 26th April, 2023

SUMMARY – The Applicant has brought an application to this Honourable Court seeking payment of gratuity in terms of a contract of employment-payment of outstanding leave days-Respondent opposed to application-counter claim payment in lieu of notice-application of golden rule of interpretation.

Held – Application dismissed- counter claim dismissed-each party to bear its own costs.

JUDGMENT

- [1] The Applicant herein is Mbhekeni Sihlongoyane, an adult Liswati male of Lubulini area in the district of Lubombo, otherwise residing in Ngwane Park in the district of Manzini.
- [2] The Respondent is Eswatini Housing Board, an Eswatini Government parastatal established in terms of the enabling Act, which has the necessary capacity to sue and be sued in its own name, with its offices situate in Mbabane in the district of Hhohho.
- [3] The present application seeks to direct the Respondent to pay the Applicant his gratuity in terms of his contract of employment. The Applicant has now approached the Court seeking an order in the following terms:
- 3.1 Declaring that the Applicant is entitled to a gratuity in terms of the contract of employment between the parties.**

- 3.2 Directing the Respondent to pay the Applicant a sum of E179,257.90 (One hundred and seventy-nine thousand two hundred and fifty-seven Emalangeni ninety cents) in gratuity;**
- 3.3. A sum of E26, 602.80 (Twenty-six thousand six hundred and two Emalangeni eighty cents) in lieu of leave;**
- 3.4 Costs of making the application;**
- 3.5 Any further and /or alternative relief.**

[4] The Applicant's application is opposed by the Respondent and an Answering Affidavit was duly filed and deposed thereto by the Respondent's Head of Corporate Services Ms. Khulile Dlamini. The Applicant thereafter filed its Replying Affidavit.

[5] The matter came before this Court for the first time on the 14th of December, 2022, wherein the parties agreed on the time frame for the filing of pleadings, and heads of argument, and the matter returned before Court 14th March, 2023 for allocation of a date for arguments. The matter was accordingly allocated the 23rd March, 2023 on which date the matter was argued and judgment reserved.

APPLICANTS TESTIMONY

[6] It was the Applicants submission that the application before Court is for the payment of gratuity, and payment *in lieu* of leave. The Applicant averred

that an amount of E179,257.90 (One hundred and seventy-nine Thousand two hundred and fifty-seven Emalangeni ninety cents) being his gratuity and a sum of E26,602.80 (Twenty-six Thousand six hundred and two Emalangeni eighty cents) in *lieu* of leave is owed by the Respondent to the Applicant. The Respondent has refused to pay the Applicant the said amount owed in terms of the employment contract, despite a lawful demand.

[7] It is common cause that the Applicant was employed by the Respondent on a fixed term contract, which expired on the 31st March, 2023. It is also common cause that the Applicant resigned from his employment in September, 2022 without having fully completed his contract, and without having served notice. At the time of resignation, the Applicant earned a monthly salary of E25, 335.94 (Twenty-five Thousand three hundred and thirty-five Emalangeni ninety-four cents). Over and above the basic salary, and benefits the Respondent also made a contribution towards the Applicants gratuity equivalent to twenty five percent, of his monthly salary for each completed year of service. The Applicant submitted that the gratuity accrued on a monthly basis, and at the time of the Applicant's resignation, an amount of E179, 257.90 (One hundred and seventy-nine Thousand two hundred and fifty-seven Emalangeni ninety cents), had accrued in gratuity for the months worked.

[8] It was the Applicant's evidence that despite lawful demand the Respondent refuses to pay the gratuity, stating that he was not entitled to gratuity since he had resigned before the expiry of the fixed term contract. Furthermore, the Applicant is also seeking payment of the sum E25, 335.94 (Twenty-five Thousand three hundred and thirty-five Emalangeni ninety-four cents) in

lieu of outstanding leave of 21 days. The Applicant however did admit that the issue was partly resolved as it was agreed that the Applicant would not serve notice.

[9] The matter is now before Court for determination of whether the Applicant is entitled to gratuity in terms of **Clause 10.1** of the contract, and payment of his leave days. The Court is being called upon to interpret clause 10.1 of the contract, which in the Applicant view entitles him to payment of the gratuity. **Clause 10.1** of the contract reads as follows;

“Over and above the base salary and other benefits set out herein, it is recorded that upon the expiry of this agreement on a termination date thereof as provided for above and including any unlawful and unfair dismissal, the employer shall pay to the employee a gratuity equivalent to twenty-five percent (25%) of every monthly salary for each completed year of service. The gratuity shall be accrued monthly.”

[10] It was the Applicants submission that upon the reading/ interpretation of **Clause 10.1** the Court should find that the Applicant is entitled to payment of his gratuity upon resignation. It was his averment that from reading of **Clause 10.1** it is evident that the Applicant is entitled to a gratuity payment upon a termination date as stated by the contract. The use of the indefinite article “a” clearly connotes that the termination date is not specific. It was his further averments it would have been different had the language of the agreement used the definite article “the”, which connotes that the termination date is specific.

- [11] It was its submission that in terms of the contract, termination of the contract can be done in three ways. Firstly, in terms of **Clause 3.3**, which is at the expiry of the contract period. Secondly in terms of **Clause 5.1**, at the termination of the contract by either party, by giving the other party one month's notice. Lastly in terms of **Clause 6.1**, termination as a result of the Applicant becoming permanently disabled or otherwise unable to perform his duties. Any of the scenarios referred to above qualify as a termination date for purposes of the contract.
- [12] It was the Applicant's argument that for the Court to adopt an interpretation which recognizes the 31st March, 2023 as a termination date, would not only lead to absurdity but would be inconsistent with the rest of the contract. It was its further argument that the gratuity accrued on a monthly basis, and that nowhere in the contract does it state that the Applicant shall forfeit his gratuity if he resigns before the termination date. Further it was the Applicant's argument that there is nothing in law that justifies the Respondent deducting or withholding the Applicant's gratuity.
- [13] It was the Applicants submission that the Court should interpret the contract to include resignation as a termination date for purposes of the contract. Further that gratuity forms part of the Applicant's wages, and cannot be deducted and or withheld without any lawful excuse in support of this averment the Applicant cited the case of **MBONO DLAMINI AND TWO OTHERS V MINISTRY OF ECONOMIC PLANNING AND DEVELOPMENT AND TWO OTHERS [2017] SZIC 42**, and the case of **MARTHA BUYILE MDLULI V THE SWAZILAND GOVERNMENT [2003] SZIC 3**. The Applicant

further cited the case of, **STUART BANKS V IMPHILO CLINIC (PTY) LTD AND OTHERS 9528/2007) [2008] SZIC 48.**

[14] In closing it was the Applicant's submission that on the issue of outstanding leave, it was its claim that it is owed a total of 21 days, and not 12.5 days as submitted by the Respondent. It was its argument that the Respondent as custodian of the record of employment has failed to furnish any proof rebutting its claim that it is entitled to 21 days leave payment. It was the Applicant's evidence that the counter claim by the Respondent in the amount of E17, 734.50 in lieu of him not serving his notice is disputed, in particular because the Respondent's calculations are incorrect. It was the Applicant's submission that he worked five (5) days a week, meaning he works a total of twenty (20) days a month, and the Respondent has incorrectly calculated the leave owed. Further even if it was to admit that it owed the Respondent notice, the amount owed after a set off with the remaining leave days, would be the sum of E 1,266.86 (One thousand two hundred and sixty-six Emalangeni and eighty-six cents). It was its prayer therefore that its application be granted in its favour in terms of its notice of application.

RESPONDENTS TESTIMONY

[15] In rebuttal it was the Respondent's submission that in terms of **Clause 10.1** gratuity is payable to the Applicant on a termination date provided for in **Clause 3.2** of the contract of employment. **Clause 3.2** of the contract reads;

“The agreement shall subsist for three (3) year period from the effective date up to and including 31st March, 2023”.

It was the Respondent’s argument that the intention of the parties cannot be gleaned from any other part of the contract except from **Clause 3.2** and **10.1**. From the reading of these clauses, it is evident that the termination of the contract is effective on the expiry of the contract on the 31st March, 2023, and/or on the unlawful and unfair dismissal of the Applicant.

[16] It was the Respondent’s further argument that the express mention of one excludes any other. If it was the intention of the parties that upon resignation, gratuity would be paid to the Applicant then this clause would have been included in the contract. It was the Respondent’s argument that gratuity does not form part of the definition contemplated by Section 2 of **The Employment Act 1980**. Further, that gratuity is paid post the completion of the contract, and not upon the resignation of the Applicant. It was therefore its argument that the Applicant is therefore not entitled to payment of gratuity, as he terminated the contract before the agreed expiry date of the contract being the 31st March, 2023.

[17] It was further its argument that the Applicant has approached the Court relying on **Clause 10.1** which does not provide for termination by resignation. The Clause which provides for early termination of the contract is **Clause 6.1**, which talks to permanent disability of the Applicant. The Applicant cannot find comfort in this clause as he resigned from the Respondent’s employment of his own accord, and not due to a disability. The Applicant therefore is not entitled to the payment of gratuity.

[18] The Applicant also seeks payment of leave days alleging that he is owed Twenty-one (21) leave days. On the other hand, the Respondent alleges that the Applicant had twelve point five (12.5) leave days outstanding. In its defense the Respondent raised two arguments, firstly it placed reliance on **Clause 5.1** which stipulates that a one months' notice should be given by either party as notice for termination of the contract. The Applicant in the present matter failed to give the Respondent the one months' notice, thus breaching the terms of the agreement. Secondly the Applicant forfeited the leave days, as same were used in lieu of his notice to the Respondent. Further that even if there was a dispute of facts relating to the number of outstanding leave days, **Clause 5.1** diminishes the Applicant's right to claim any leave days.

[19] It was its further argument that the Respondent's submission that the Applicant is in breach of **Clause 5.1** as he failed to give the Respondent notice. The Respondent as a result decided to off-set the number of leave days with the one months' required notice. The Respondent as a result thereof subtracted twelve point five (12.5) from the thirty (30) days, meaning that the Respondent is owed a total of seventeen point five (17.5) days which amount to E17,734.50 (Seventeen Thousand seven hundred and thirty-four Emalangeneni and fifty cents). The Respondent now seeks a counter claim from the Applicant in the said amount in lieu of notice. It was the Respondent's prayer that the Applicant's application be dismissed and that the Applicant be directed to pay the Respondent E17,734.50

(Seventeen Thousand seven hundred and thirty-four Emalangeni and fifty cents), being its counter claim in respect of notice.

ANALYSIS OF EVIDENCE AND THE APPLICABLE LAW

[20] This matter is vexed with the question of interpretation of the provisions of the contract of employment. It particular it behooves the Court to determine whether or not in terms of this contract, the Applicant is entitled to gratuity if he leaves employment on his own accord before the end of the contract period. The genesis of the controversy is nomenclature of **Clause 5.2** and **10.1** of the contract of employment. In terms of **Clause 5.2**, when the contract is terminated in terms of **Clause 5.1**, which reads;

“Either party can terminate this contract before the expiration date giving the other party one (1) calendar month notice”. (Underlined words are own emphasis)

The employer shall be obliged to pay the employee/ Applicant the wages and leave accruing to the employee as at the termination date.

[21] Whilst *Clause 10.1* stipulates, *“that over and above the base salary and the other benefits set out herein it is recorded that upon the expiry of the agreement on a termination date thereof as provided for above, and including any unlawful and unfair dismissal, the employer shall pay to the employee a gratuity equivalent to twenty five percent (25%) of every monthly salary for each completed year of service. The gratuity shall be accrued monthly.”* (Underlined words my own emphasis.)

[22] Now according to the underlined sentence "*upon the expiry of the agreement on a termination date thereof as provided for above...*" It is evident that the intention of the Clause is that gratuity will be paid upon the expiry of the contract on a termination date provided for above. The provision of the expiry of the contract is stated in **Clause 3.1** and **3.2** of the contracts which reads:

"The effective date of this agreement is 01st April, 2020 and for the duration of this agreement and any extended term thereof, the employee shall remain in the exclusive employ of the employer and shall not accept any other employment or whatsoever nature whilst so employed by the employer.

The agreement shall subsist for a three (3) year period from the effective date up to and including 31st March, 2023."

[23] The Court has looked at the word expiry, and in terms of the **Concise Oxford Dictionary, 9th Edition, 1995** it is defined as;

"the end of the validity or duration of something."

Whilst **Black Laws Dictionary, 7th Edition, 1999** defines expiration as;

"a coming to an end, a formal termination on a closing date."

[24] It is evident that the term upon the expiry of this agreement in particular the word 'expiry' refers to the end of the validity, duration and termination of a closing date. On its own accord the word 'expiry' cannot resolve the conundrum as to when is gratuity payable to the employee. This calls for the Court to further examine the common intention of the parties in this regard, taking into consideration the background circumstances that existed

at the time the parties entered into the contract, including the nature and purpose of the contract.

[25] **The Concise Oxford English Dictionary 11th Edition**, defines the term gratuity as;

“a sum of money paid to an employee at the end of a period of employment.”

In the case of **MICHAEL MNGADI V THE BOARD OF TRUSTEES OF THE MOTOR VEHICLE ACCIDENT FUND’S PENSIN FUND AND SIX OTHERS I/C CASE NO 343/08**, the Court stated the following;

*“The Respondent’s counsel submitted that a retirement benefit is not a right, it is an incentive and a reward for good performance. We reject this submission. In the United Kingdom, pension benefits have been recognized as remuneration or part of the quid pro quo in the employment relationship. The South African Court affirmed the position that pension benefits are part and parcel of employing labour, and part of the remuneration which labour receives for services rendered. They form an integral part of the industrial relations bargain. See **DAMANT AND JITHOO: THE PENSION PROMISE PENSION BENEFITS AND EMPLOYMENT CONTRACT (2003) 24 ILJ**, and the cases there cited **ADJUDICATOR AND OTHERS (2002) 21 ILJ 1947**, the Court accepted that pension rights amount to deferred pay rather than gratuities bestowed within the benevolence of the employer.”*

[26] As articulated previously the background circumstances prevailing at the time of the conclusion of the contract informs the nature and purpose of the contract, and this is embodied in the contract as signed by the parties and nowhere else. According to the golden rule of interpretation, the language

in a document should be given its grammatical and ordinary meaning unless this would result in absurdity or repugnancy or inconsistency with the rest of the document, as rightly stated by the Applicant.

- [27] According to **Clause 3.1** and **3.2** of the contract of employment the effective date for the commencement of the contract is the 1st April, 2020. The contract in terms of **Clause 3.2** is to subsist for a three-year period up to and including the 31st March, 2023. **Clause 5** of the contract then proceeds to deal with the termination of the contract. **Clause 5.1** stipulates that either party can terminate the agreement before the expiration date by giving the other party one month's notice. (Underlined my own emphasis).
- [28] A reading of **Clauses 3** and **5** of the contract, indicate that the parties intention when drawing up the contract, was for the contract of employment to be terminatable in one of three ways. Firstly, in terms of **Clause 3.2**, when the contract expires, or in terms of **Clause 5.1** before the expiration date of the contract, by way of giving one month's notice to either party, and lastly in terms of **Clause 6**, being permanent disability or death. **Clause 5.2**, then goes on to stipulate what the employer is obligated to pay the employee, when termination is in terms of **Clause 5.1**. It stipulates that the employee or Respondent shall be obligated to pay the employee the wages and leave accruing to the employee as at the termination date.
- [29] The logic of **Clause 5.2** being that where either party has deliberately terminated the contract, before the expiry date, signifying that he/she or it, no longer wants to be bound to the other party, the consequence thereof is

that the employer is obligated to pay wages and leave days that have accrued. No provision is made for the payment of *pro rata* gratuity.

[30] On the other hand of significance is that in terms of **Clause 10.1** which deals with when gratuity is payable, the clause states that the employer shall pay to the employee a gratuity equivalent to twenty five percent (25%) of every monthly salary for each completed year of service, upon the expiry of the agreement on termination date. Meaning the Applicant will only be entitled to the payment of gratuity on the expiration of the agreement, which according to the contract is the 31st March, 2023. The Court therefore concludes that **Clause 5.2** of the contract of employment between the parties, obligates the Respondent to pay the Applicant only accrued wages and leave days. It does not obligate or provide for the payment of *pro rata* gratuity, and if the intention of the parties was for the payment of gratuity upon termination in terms of *Clause 5.1* the parties would have expressly included and stated it in *Clause 5.2* of the contract.

[31] The Court therefore finds that the Applicant terminated the employment contract in terms of *Clause 5.2* of the contract of employment, which entitles him to only be paid wages and leave days accruing. The Applicant is not entitled to the payment of gratuity, had the termination been upon the expiry of the contract being the 31st March, 2023, then the Applicant would have been entitled to gratuity.

[32] On the remaining issue of the Respondent's counter claim, that the Applicant failed to serve notice in terms of **Clause 5.1** of the contract. The

Court finds that the Respondent waived its right to notice pay, when it accepted the Applicant's resignation without giving notice. Had the Applicant not approached the Court seeking compensation for payment of gratuity, the Respondent would probably have not pursued the issue of notice pay. In any event on the papers before Court both the Applicant have failed to produce enough evidence to guide the Court, on the outstanding number of days which were due to either of the parties. Therefore, the Court makes no award to the Respondent's counter claim, and the Applicant's claim for outstanding leave pay.

[33] The Court accordingly makes the following orders:

33.1 The Applicant's application is dismissed in its entirety.

33.2 Respondent's counter claim is dismissed.

33.3 Each party is to bear its own costs

The Members Agree.


B. NGCAMPHALALA

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT: Mr. B. Phakathi (Phakathi Jele Attorneys).

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