



Civil Appeal Case No.2/02

In the matter between:

CYNTHIA SIZAKELE MABASO Appellant

VS

FIRST NATIONAL BANK OF SWAZILAND Respondent

CORAM: BROWDE J.A.

STEYN J.A.

ZIETSMAN J.A.

JUDGMENT

ZIETSMAN J.A.

The appellant, who was born on 9th November 1947, commenced her employment with the Bank of Credit and Commerce on 1st December 1978. The business of the said bank was later taken over by the Meridian Bank which in turn was taken over by the First National Bank of Swaziland (the respondent). The appellant was in continuous employment with the bank throughout this period and until her retirement in January 2000. Her years of service with the bank accordingly dated from 1st December 1978.

During the early 1990's she became sickly and her health deteriorated over the years. During January 2000 she obtained from the respondent a written document referred to as the appellant's "Benefit Statement as at 31 January 2000." Details of her date of birth, salary, pensionable salary etc are set out in the document. She is advised further that if

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before retirement she is unable to work as a result of disability due to sickness or accident she may receive, after a period of 6 months, a monthly disability income of E5023-75. It is interesting to note that provision is also made for payment to the appellant of a sum of approximately E51 391.28 "on leaving service" and a monthly pension of E1473.36 if she reaches her normal retirement date. Should she die in service before reaching her normal retirement date her dependants would receive a return of her contributions to the fund, with interest, amounting to E28 550.99 plus a further lump sum of E24 1140.00.

In the said document it is alleged that she joined the "Company" on 1st December 1991. Her normal retirement date is given as 30th November 2002.

It is stated in the document that payment of the full benefits is subject to the insurance company's medical and other policy documents, and that the figures in the statement "are for illustration purposes only".

During January 2000 the appellant was examined by her doctor, Dr J.W. Stephen, who is also the doctor used by the respondent for the medical check up of its employees. Dr Stephens declared

her to be unfit for work. On 19th January 2000 the appellant wrote a letter to the respondent in which she stated, inter alia, the following:

"On the basis of the condition of my health which is no longer stable and the fact that I am left with only two years ten months before my actual retirement date, I kindly request the bank to allow me to take an early retirement with immediate effect."

Dr Stephens then submitted to the respondent a certificate concerning the appellant in which he stated: "This patient of mine is no longer fit to work due to heart failure. "

On 21st January the respondent's Head of Human Resources wrote a letter to the appellant in the following terms.

"Dear Mrs Mabaso

We acknowledge receipt of your letter dated 19th January 2000 regarding early

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retirement.

The Bank is agreeable to your request on the following condition:

1) You use the approved leave starting 26th January 2000 to 29th February 2000 as notice. The logistics of early retirement will be discussed with our Pension Fund Administrators and relevant information as regards monthly payments and your contributions will be advised to you under separate cover.

You are therefore not required to come to work from Monday, 24 January 2000."

The appellant complied with the terms of this letter and did not return to work. She expected then to receive the disability benefit of E5023.75 per month as set out in her Benefit Statement. To her dismay she received payment of only E687.68 per month and was told by the respondent's Human Resources Manager that the respondent's Pension Fund had rejected her retirement on medical grounds and had said that she should return to active employment.

The appellant alleges that she cannot return to work because of her state of health. She states further that she was at no time told by the respondent that she should return to work, and that the vacancy caused by her retirement has been filled. This is admitted by the respondent.

The appellant alleges in the circumstances that she is unable to work as a result of her disability due to sickness, and that she is accordingly entitled to payment of the disability income of E5023.75 per month. She seeks an order against respondent directing the respondent to pay her the said sum of E5023.75 per month until she reaches age of retirement and asks that the order be backdated to 1st March 2000. She also seeks an order for costs against the respondent on the attorney and own client scale.

The opposing affidavit by the respondent is signed by Henry Nthethwa, the respondent's Human Resources Manager. A point was initially taken by the appellant's counsel that

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Mthethwa's affidavit is fatally defective and should be struck out in view of the fact that no

resolution authorising him to depose to the affidavit had been filed. Mthethwa alleges that he has the necessary authority by virtue of his position with the bank, and after he had been referred to cases such as *Moosa and Cassim NNO v Community Development Board* 1990 (3) S.A. 175 (AD) and *Tattersall & Another v Nedcor Bank Ltd* 1995 (3) S.A. 222 (AD) appellant's counsel did not proceed with the point.

The essence of the respondent's opposition to the appellant's claim is that it is not the respondent that determines what must be paid to one of its employees on retirement, but the pension fund (the First national Bank of Swaziland Pension Fund) which is a legal entity separate from the bank and which is capable of suing and being sued in its own name. In his letter to the appellants in which her requested retirement was accepted the respondent's Head of Human Resources, wrote, inter alia, "the logistics of early retirement will be discussed with our Pension Fund Administrators and relevant information as regards monthly payments and your contributions will be advised to you under separate cover." It is submitted, on behalf of the respondent, that this was an indication to the appellant that it is the Pension Fund and not the bank (the respondent) that makes the decisions concerning retirement and payments resulting therefrom, and that if the appellant has any claim it should be brought against the Fund.

The letter does not refer the appellant to the Fund. The letter advises the appellant that the respondent will discuss the matter with "our" (the respondent's) Pension Fund Administration, and appellant's argument is that she has never had any dealings directly with the Fund and that her sole contract was with the respondent bank.

In his affidavit Mthethwa states that while the bank could approve the appellant's application for retirement this was "obviously subject to the approval by the Pension Fund which basically pays employees who take up retirement or who are disabled. The Bank cannot decide for the Fund that the employee is now disabled and cannot continue in employment. Even if the bank accepted the request for early retirement, the approval of the Fund is still necessary." This was never communicated to the appellant. The respondent, without referring the matter to the Pension Fund, accepted her application for retirement and told her that she was "not required to come to work from Monday, 24th January 2000."

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The appellant's application to the High Court was dismissed and she was ordered to pay costs "on the scale of attorney and client". The only reason for making such a cost order seems to be the fact that both parties sought such an order. This is no reason for granting such an order. The appellant was clearly bona fide in bringing her application and the mere fact that the court found her application to be without merit was no reason for making a punitive costs order against her.

The basis of the High Court's decision to dismiss the appellant's application was the finding by the court that the appellant's action, if any, lay against the Pension Fund and not against the Bank.

In his argument before us Mr Thwala, for the appellant, submitted that the appellant's contractual relationship was with the respondent and not with the Pension Fund, that the respondent had accepted the appellant's retirement on the basis that she was unable to work because of her disability and that she was accordingly entitled to the disability income referred to in the Benefit Statement. His argument suggested that the Pension Fund was bound by the retirement decision made by the respondent Bank.

In her replying affidavit the appellant alleges, in paragraph 19.1, that the "Respondent should carry the expense as I am definitely entitled to my benefits". In an alternative argument Mr Thwala submitted that if the Pension Fund was not liable to pay the appellant the disability

income, the respondent should be held liable to do so. This he submitted was on the basis of a misrepresentation by the respondent to the appellant which she accepted and acted upon to her prejudice by retiring from her employment in the belief that she would then receive the disability income. This form of action is not clearly spelt out in the appellant's papers and the respondent has not had an opportunity to deal adequately therewith. We feel that such an opportunity should be given to the respondent before the matter is finally determined.

There is a further matter, not directly dealt with in the papers, but which is of concern to us. It appears that the only benefit the appellant stands to receive from the respondent or from the Pension Fund, if her present application fails, is the sum of E687.68 per month. No mention is made of any lump-sum payment to her or of the return to her of any of the contributions she has made to the Fund. If this is correct, she stands to gain far less than

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she would have received if she had carried on working for another 2 years and 10 months until her normal retirement date, and far less than her dependants would have received if she had died in service just before retirement. There is no indication on the papers how the sum of E687.68 has been determined. The only information we have on the papers is that the respondent's Human Resources Manager told the appellant that he did not know how the Fund had arrived at such a figure. It is clear from the papers that the appellant's years of service with the bank date from 1st December 1978 and not from 1st December 1991, the date mentioned in the Benefit Statement. We do not know what date was taken by the Pension Fund when it arrived at the figure of E687.68 and how that figure was determined. We feel that this is also a matter which should be taken up by the respondent with the Pension Fund administrators.

The appellant's cause of action was inelegantly pleaded. It appears that, if properly advised she should, once the respondent raised the issue that the Pension Fund was a separate legal persona which was legally liable to pay the relevant benefits, have joined the Fund in her action. However, reading the papers as a whole it seems clear to us that the manner in which she was dealt with personally and through no fault of her own has resulted in an unfair outcome. We are certain that neither the Bank nor the Fund would like her to suffer and for them to benefit from such a circumstance.

Appellant had every reason to believe that she would, if retired by the bank on the evidence of the medical adviser, be in receipt of a disability benefit of E5023.75 per month. On the papers before us, the issue of the degree and extent of her disability were never intensively investigated - save for a report from the Insurer's occupational therapist. From this it appears in any event that she is at least seriously disabled with a poor long-term prognosis.

These circumstances call out for an ameliorative response by the Bank and/or the Pension Fund. This court anticipates therefore that those two bodies will-co-operate to achieve a fair outcome for their employee and member who has given them 23 years of service.

The order we make is that the order granted by the High Court, including the order for costs, is set aside. The application is referred back to the High Court with leave given to the respondent to file a further affidavit or affidavits dealing with the points set out in this judgment, and with leave given to the appellant (as applicant) to reply thereto, if so

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advised. The right is also reserved to the appellant to join the Pension Fund as a respondent in any further proceedings. The costs of this appeal will be costs in the cause.

N.W. ZIETSMAN J.A.

I agree

J. BROWDE J.A.

I agree

J.H. STEYN J.A

Delivered in this 7th day of June 2002