IN THE COURT OF APPEAL OF SWAZILAND

CIVILAPPEAL CASE NO. 19/2005

In the matter between:

S.S. Dlamini N.O.1 st Applicant

T.R.T. Nhleko N.O 2nd Applicant

L. Groening N.O. 3rd Applicant

J. Mabon N.O. 4th Applicant

D.S. Nxumalo 5th Applicant

C. Nxumalo 6th Applicant

T.G. Ginindza 7th Applicant

Musa Vilakati N.O. 8th Applicant

Standard Bank of Swaziland 9th Applicant

Swaziland Union of Financial Institutions

And Allied Workers 10th Applicant

and

Pheneas Mancele Dlamini 1st Respondent

Ben Khumalo 2nd Respondent

Robert D. Mavuso 3rd Respondent

John R.M. Dlamini 4th Respondent

Jan J. Dlamini 5th Respondent

Robert T. Mnisi 6th Respondent

Mario Masuku 7th Respondent

Alpheous Jabulani Dlamini 8th Respondent

Iris Muriel Healy 9th Respondent

Rossan Lorandos 10th Respondent

Maggie Lindiwe Dlamini11th Respondent

Thembi Nzuza12th Respondent

Nomsa G. Makhoba13th Respondent

Ruth Sibongile Ndlangamandla 14th Respondent

Dudu Priscilla Mazibuko 15th Respondent

Generousa Mazibuko 16th Respondent

Margaret Mathabela17th Respondent

CORAM:

R.N. LEON J.P
P.H. TEBBUTT J.A.
N.W. ZIETSMAN J.A.

JUDGMENT

ZIETSMAN J.A.

The ninth respondent, the Standard Bank of Swaziland Limited, is the legal successor to Barclays Bank of Swaziland Limited. The change of name and the date when this took place is of no consequence in this matter and for the sake of convenience I shall refer simply to "the bank".

The bank was faced with certain problems and wished to reduce its staff complement. It decided, therefore, to introduce a Voluntary Exit Scheme open to all pensionable Swazi citizens who were staff members. This entitled such members to early retirement and to the payment of their pension benefits.

The respondents were all staff members who qualified and who decided to accept early retirement in terms of the Voluntary Exit Scheme. They were given the option to accept their pension benefits by way of a cash payment and this option was accepted by them. They duly received and accepted payments from the bank, but when they subsequently discovered how the amounts had been calculated they came

to the conclusion that an incorrect basis for the calculations had been adopted and that they had been underpaid. They accordingly brought an application in which they claimed an order directing the appellants to calculate correctly the amounts due to them and to pay to them the balance of the amounts so calculated. The appellants opposed the application but it was granted by the judge a quo and it is against his judgment that the appellants now appeal.

The judge a quo came to the conclusion that the 6th and 7th respondents were incorrectly cited as respondents and no order was made against them. There is no dispute about this.

Several grounds of appeal are noted in the appellants' notice of appeal but they can be narrowed down to two issues. In the first place the appellants submit that the correct basis for calculating the amounts due to the respondents had been adopted and that the calculations had been correctly done. Secondly, it was submitted that in accepting the money offered to them the respondents had waived their right to contest the correctness thereof.

I shall deal firstly with the basis used by the bank in calculating the amounts due to the respondents.

What was to be paid to the respondents was their "deferred pensions". The bank had prepared a set of Staff Pension Fund Rules applicable to the bank's employees. Relevant to this appeal are Rules B, C and E.

Rule B is headed "Rules applicable to Male Officials". This rule provides that the normal retirement age for a male official is 65 years. Rule B1 (b) (iv) provides that such official will be granted a pension "subject to the General Rules and calculated according to the undermentioned conditions" provided that he has retired at the request of the Directors before reaching the age of 65 years after satisfactory

service by reason of redundancy. A further provision is that he must have completed 10 continuous years of service with the bank. Rule B2 sets out how such official's pension is to be calculated.

Rule C applies to woman officials and is in the same terms as Rule B save that the age limits for female employees differ from those of the male employees.

Rule E is headed "Rules applicable to the payment to officials and non-clerical employees of deferred pensions". Rule E l reads: "If a member who leaves the service of the Bank without being entitled to a pension under the provisions of any of the preceding Sections of these Rules has completed 10 continuous years of service with the Bank ....the Trustees shall ..... grant to such member a deferred pension". Rule E2 stipulates how this deferred pension is to be calculated.

In order to regulate the position of the employees who wished to take advantage of the Voluntary Exit Scheme a Rule referred to as a Redundancy Rule was adopted. This Redundancy Rule reads as follows:

"1. Notwithstanding any provision to the contrary contained in these Rules including Rule 2 but not limited thereto by the generality of this provision, any Pensionable Member who has . iri-exce^

1.1 is declared redundant by the Bank in terms of the provisions of the Employment Act of 1980, or

1.2 accepts a voluntary redundancy package from the Bank shall be entitled to the value of his or her deferred pension ascertained by actuarial calculation as at the date of redundancy.

2. The Pensionable member becoming entitled to such deferred pension as is set out above may request the Fund in writing to convert such deferred pension value to cash and upon such request shall be entitled to payment of such cash value within a period of ninety (90) days of such written request being made to the Fund.

3. The calculation of the cash value of a deferred pension referred to in this Redundancy Rule shall be carried out by the Bank's Actuary whose calculation shall be final and binding upon the members and the Directors and the Bank's Actuary shall not be required to give any reason or explanation for the figures so calculated."

It is common cause that in calculating the amounts due to the respondents the bank applied the formula set out in Rule E. The respondents maintain that the formula set out in Rule B (for the male employees) and Rule C (for the female employees) should have been applied, and this was the finding of the judge a quo. It appears probable from the papers that if Rules B and C had been applied the respondents would have received larger cash payments than the amounts sent to them by the Bank. However, if it should turn out that any of the respondents, after a correct calculation has been done, has been overpaid provision is made in the judgment of the court a quo for a refund to be paid by the employee to the bank.

Mr. Smith, who appeared for the appellants, has submitted that the judge a quo erred in coming to the conclusion that Rules B and C applied. He submitted that because the Redundancy Rule does not specifically amend Rule B or Rule C the formula set out in Rule E must apply. In my opinion there is no merit in this submission. The Redundancy Rule was adopted to enable employees to retire earlier than they would normally have been able to retire, and to then immediately receive their pensions, in cash if they so wished. There is no suggestion that the formula for the determination of their pensions would be affected. They all qualified as employees in terms of Rule B or Rule C and the Redundancy Rule provides that on retirement each respondent "shall be entitled to the value of his or her deferred pension". Rule E applies to employees who would not be entitled to pensions in terms of Rule B or Rule C. None of the respondents fall into that category. The judge a quo was therefore correct in

deciding that the respondents' pension payments should have been calculated in terms of Rules B and C. This was not done and incorrect amounts were sent to the respondents. The question is whether the respondents were then entitled to demand that the correct amounts be calculated and paid to them.

The judge a quo ruled that the respondents could claim that the correct amounts be calculated and paid to them.—Mr-.- Smith has submitted that the judge a quo erred in that finding. He bases his submission on two grounds, the first of which is the following.

The Redundancy Rule provides, in paragraph 3 thereof, ;

"The calculation of the cash value of a deferred pension referred to in this Redundancy Rule shall be carried out by the Bank's Actuary whose calculation shall be final and binding upon the members and the Directors and the Bank's Actuary shall not be required to give any reason or explanation for the figures so calculated".

Mr. Smith submits that the respondents were therefore precluded from questioning the correctness of the calculations done by the actuary.

It is clear from the papers that the calculations were done by the bank and not by the bank's actuary. Paragraph 3 of the Redundancy Rule was thus not complied with and for this reason alone Mr. Smith's submission cannot succeed. But even if the calculations had been done by the actuary it would still, in my opinion, be open to the respondents to prove that the wrong basis for those calculations had been adopted and to claim that the calculations be redone. Each respondent was entitled to "his or her deferred pension" and not to a deferred pension to which an employee falling under a different category

might have been entitled. It was at least necessary to show that the actuary had adopted the correct basis for his calculations before it could be held that the respondents were bound by the results of his calculations.

This finding makes it unnecessary for us to decide whether the clause referred to- is *in- any case invalid and -unenforceable - as being contra bonos mores,

Mr. Smith's first submission must therefore fail.

His second submission concerns the terms in which the payments were sent to the respondents and accepted by them. A letter was written by the bank to each respondent confirming the fact that he or she would cease to be a member of the bank's staff as from a certain date. The third paragraph of the letter reads:

"We set out below a summary of the sums that will accrue to you under the Voluntary Exit Scheme and which sum you will accept in full and final settlement of all claims which you may have against the Bank either now or in the future after deducting amounts relating to loans as is set out hereunder the calculation being based on your annual salary of E "

There then follows several categories in respect of which payments to the respondents are said to be due with the cash amount payable in respect of each category. One such item is the deferred pension. A figure is given but the respondent is not told how, or in terms of which Staff Pension Fund Rule, the

amount has been calculated.

The letter then contains the following sentence:

"The above amount will be credited to your account on acceptance of this proposal. To indicate your acceptance please sign where indicated at the foot of this letter."

The paragraph at the foot of the letter reads:

"I the undersigned..... hereby accept the terms and conditions set out in the abovementioned letter relating to the Voluntary Exit Scheme and I confirm that I accept the sum accruing and payable to me in full and final settlement of all claims whatsoever nature which I may have against Barclays Bank of Swaziland Limited and/or Barclays Bank of Swaziland Ltd. Pension Fund either now or in the future.

..... Date ..... "

It is not clear on the papers whether the respondents signed the acceptances. What is clear, however, is that they accepted and kept the cheques sent to them. Mr. Smith submits, in the circumstances, that the respondents had waived any right they might have had to question the correctness of the amounts paid to them because they had accepted the cheques in full and final settlement of their claims.

If one accepts the allegation made by the bank, namely that the bank honestly believed that Rule E was the correct Rule to apply and that the calculations were done in terms of that Rule, the position we have

here is the following. The bank submitted to the respondents the amounts which the bank honestly believed to be the correct amounts due to the respondents and the respondents, assuming that the amounts had been correctly calculated, accepted the money. There was at that stage no dispute between the parties. Each party thought that a correct calculation had been done until it was discovered by the respondents that the wrong basis had been used for the calculations of their deferred pensions. Under those circumstances were the respondents precluded from demanding that a correct calculation be done because they had accepted the money in full and final settlement of their claims?

The use of the phrase "in full and final settlement" has been the subject of discussion and determination in several cases decided in the South African courts. What seems to be clear from the decisions to which I have been able to refer is that the phrase is correctly used, and is binding on the creditor, where it accompanies a tender in the form of a compromise in an attempt to settle a dispute. By accepting the amount so tendered the creditor willingly abandons the balance of his claim. The matter is then settled and the creditor cannot pursue his original claim. But where there is no dispute, and each party believes that the correct amount has been paid and accepted, the words "in full and final settlement" have no effect. If the creditor then discovers that he has not been paid the full amount due to him he can sue for the balance.

The question is dealt with fully in the case of Harris v. Pieters 1920 AD 644. A distinction is drawn between a payment and a tender. At page 649 the following is stated by INNES C.J.:

"Instances may possibly occur in which the context or other evidence may show that the words in question or similar words were not intended to condition the offer - that they were merely intended to

emphasise the tenderer's view as to the extent of his liability. If so, the expression would, for all practical purposes, be taken pro non scripto".

On page 650 the following is stated by INNES C.J.:

"The test in all these cases, therefore, is this: Was there a tender accompanied by money or cheque, or was there a payment with an attempt to annex a condition? In the former case, if the tender is refused the money should be returned; in the latter, if the condition is rejected the money may be retained and the balance claimed. The result of the test must depend upon the intention of the parties in each case as shown by their statements and conduct."

At page 653 - 4 DE VILLIERS J.A. states:

But it does not follow that acceptance of the tender would have implied waiver if plaintiff could have proved more damages. That would only be the case if there was a compromise or a transaction between the parties by which plaintiff waived his right to the balance:" At page 654 - 5 DE VILLIERS J.A. states:

"Now the phrase "in full settlement" is ambiguous and may mean one of two things. A debtor, in offering a sum in full settlement may intend to tender the amount unconditionally, only adding the words "in full settlement" by way of emphasising his contention that the amount tendered covers the whole of his liability. In that case the offer is made animo solvendi. Or he may intend to offer the amount on condition that the creditor by accepting it should forego his claim for the balance. In the latter case the offer is made for the purpose of entering into a new contract with the creditor, animo

contrahendi therefore. If this is clear from the terms of the offer and the creditor accepts the offer on those terms he cannot, of course, proceed."

DIDCOTT J. in the case of Andy's Electrical v. Laurie Sykes (Pty) Ltd 1979 f3) S.A. 341 (N) states the following, at page 346 B - C:

A payment's description as one "in full settlement" is not necessarily decisive. The circumstances may show that despite the description the payment is intended to satisfy nothing more than an admitted debt. If that is the true rating, the words "in full settlement" are of no further consequence and may safely be ignored".

See also the case of Van Breukelen en 'n Ander v. van Breukelen 1966 (2) S.A. 285 (A) where the distinction between a tender and the payment of an admitted debt is again drawn. In the case of Absa Bank Ltd v. van de Vyver N.O. 2002 f4) S.A. 397 (S.C.A.1 it is again stated that if the payment, tendered in full and final settlement, is made to effect a compromise the condition is binding if the offer is accepted. However, if the payment is made to pay an admitted liability it is not binding on the creditor. He can keep the money and sue for the balance which he alleges is owed to him.

In the present case the bank, in its letter to each respondent, referred to "the sums that will accrue to you under the Voluntary Exit Scheme". The sum paid to each respondent represented what the bank considered was its admitted liability to the respondent. The sum was accepted in good faith by each respondent. Neither party saw the payment as a tender or compromise in respect of a disputed claim. This being the case, the words "in full and final settlement" could not prevent the respondent, on discovering that his deferred pension payment had been calculated on a wrong basis, from claiming that

the amount owing to him be correctly calculated and the balance paid to him.

In view of these findings it is not necessary to deal with the other points raised on behalf of the respondents. The result is that the appeal is dismissed with costs.

N.W. ZIETSMAN

JUDGE OF APPEAL

I agree

R.N. LEON

JUDGE PRESIDENT

I Agree

P. H. TEBBUTT

JUDGE OF APPEAL

Delivered on the ……. Day of November 2005.