# IN THE SUPREME COURT OF SWAZILAND

## JUDGMENT

Civil Appeal Case No.56/13

In the matter between:

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| **NICHOLUS MANANA** | **1st Appellant** |
| **JOSIAH YENDE** | **2nd Appellant** |
| **DAN MANGO** | **3rd Appellant** |
| And | |
| **ACTING PRESIDENT OF THE INDUSTRIAL COURT** | **1st Respondent** |
| **SWAZILAND GOVERNMENT** | **2nd Respondent** |
| **THE ATTORNEY GENERAL** | **3rd Respondent** |

**Neutral citation**: *Nicholus Manana and Two Others vs Acting President of the Industrial Court and Two Others (56/13) [2015] [SZSC 14] (29 July 2015)*

**Coram:** **S.B. MAPHALALA AJA, S. NKOSI AJA and R. CLOETE AJA**

**Heard:** 30 June 2015

**Delivered**: 29 July 2015

**Summary:** **Application for review by nominated members of the Industrial Court - whether entitled to gratuity after term of their employment. Appellants rely on various Legal Notices - Court finds that the**

**nominated members were not permanent and pensionable employees - that the various Legal Notices relied upon do not apply. Counsel for the Appellants consented to the point in argument - court dismisses the appeal on this point with costs.**

## JUDGMENT

**MAPHALALA AJA**

**The Appeal**

[1] This is an appeal against the judgment of the High Court (**per Dlamini J.)** sitting at Mbabane delivered on the 11th September, 2013 dismissing the Appellants' Application which was brought under a Certificate of Urgency in that court. Further the Applicant were seeking an order that their gratuity be calculated according to that last contract and that it be backdated.

[2] The Appellants filed a Notice of Appeal in this court on the 25 September, 2013 on the following grounds:

1. **The learned Judge erred in law by dismissing the Application and admitting affidavits dated 6th November 2012 and 2nd April 2013 filed out of time without a substantive application for condonation with leave of Court.**

2. **The learned Judge erred in law and in fact by not considering the Amended Notice of application in so far as it dealt with the**

**allowances amounting to E8,612.00 and basing her decision solely on the sitting allowances of E9,900.99 and the initial prayers.**

3. **The Learned Judge erred by holding that the Appellants are barred from pursuing the issue of payment of the gratuity on the strength of the Court order dated 29th July 2011. The compromise related only to prayers 2.1, 2.2 and 2.4.**

4. **The Learned Judge erred by not considering the Court Order dated 28th June 2012 which in essence kept the prayer for payment of gratuity alive.**

5. **Notwithstanding the absence of any legal basis ( not contained in Legal Notice no, 146/2010) by calculating the gratuity in the manner employed by Mr Sukati, the Learned Judge erred in holding that the computations in annexure "LB1" were correct.**

6. **The Learned Judge erred and misdirected herself in holding that there was no basis to include the sum of E9,900.00 (sitting allowance) when in actual facts, the appellants earned that amount a part of their remuneration.**

7. **The Learned Judge erred by not holding that the Appellants claim for gratuity fell to be determined in terms of the provision of Legal Notice No. 146/2010 for the duration of their of service.**

## The Background

[3] The factual background of this dispute was summarised by the court *a quo* in its judgment of the 11th September, 2013 to be the following:

> **The 1st applicant was appointed as a member of the Industrial Court in 1995, 2nd applicant in 1991 while 3rd applicant in 1997. Their function was to sit with the presiding Judge in matters before the Industrial Court and assist him on questions of fact. It appears from the pleadings that since**

**the inception of their contract of employment they have been given a three year contract renewable. In their contract however they were given two years for purposes of completing part heard matters. In some instances, 2nd respondent would issue gazettes on their appointments.**

[4] The thrust of the appeal before this court was on the issue of gratuity in prayers 3, 4 and 5 of the Notice of Appeal.

[5] The Appellants in the court *a quo* were seeking an order that their gratuity be calculated according to their last contract and that it be backdated.

[6] The Respondent on the other hand opposed the above contention stating that the Appellants were paid in full their gratuity and the calculations were done in terms of their contracts as per the relevant Gazettes.

[7] Before dealing with the issue for decision I wish to point out that the parties had entered into a Deed of Settlement in respect of the other issues between the parties and what remained was the issue of gratuity.

[8] The attorneys of the parties advanced their arguments and filed their respective Heads of Arguments on the point of gratuity. Further, the issue of the

admission of the Answering Affidavit by the court *a quo* is also put in contention.

**The Issue of Gratuity**

[9] In my assessment of the arguments of parties to and fro and the papers filed before this court it is my considered view that Respondent is correct in its contention on a number of grounds.

[10] Firstly, I agree with Respondents point that gratuity serves the same purpose as a severance allowance as they are both service benefits. That calculating gratuity in the case of a fixed contracts is different one that used in the case of other forms of employment. However, the difference between gratuity and severance allowance is governed by Statute in particular section 34 of the Employment Act of 1986. However, in the case of gratuity, it is governed by the terms of contract between the employer and employee.

[11] Secondly, the Respondent is correct that on a case of a fixed contract of employment with Government, gratuity is calculated at a given percentage of the total salary of the employee at that given time. However, still calculations differ when one is calculating gratuity for a permanent and pensionable

employee in that case the calculations are based on the basic salary at the time of retirement.

[13] In the present case, the Appellants seek for their gratuity to be calculated as if they were permanent and pensionable employees who were working on fixed term contracts and as such it should be calculated based on a certain percentage of their basic salary at that given time of the contract. Bearing in mind that the Appellants were engaged on various fixed terms contracts and each contract paid a different retainer fee. That therefore in calculating the Appellants gratuity, the retainer fee of each term of contract should has to be used.

[14] Thirdly, it would be impossible and wrong for 2nd Respondent to calculate the Appellant's gratuity using their last retainer fee since they were not permanent and pensionable. And as such it would be impossible to use the format for calculating gratuity for permanent and pensionable employees.

[15] Fourthly, the arguments before us by the attorney for the Appellants when taxed by the court, conceded that there was no basis of their claims on Legal Notices relied upon by the Appellants. These being Legal Notices No. 123, 143 and 144 or 2001. Further the attorney for the Appellant agreed with the court that their claim is for damages elsewhere.

[16] Coming to the issue of the Appellants contention challenging the judge *a quo* discretion in allowing the Answering Affidavit that had been filed out of time, it appears to me that the issue for determination was a question of law in particular as to how the gratuity should be calculated. Nothing turns on this ground as it does not take the matter any further in view of the crisp point for decision by this court.

[17] In the result, for the aforegoing reasons the appeal fails and is dismissed with costs.

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S.B. MAPHALALA AJA

I AGREE :

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S. NKOSI AJA

I AGREE :

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R. CLOETE AJA

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| For the Appellants | : | Mr. M. Simelane<br>(of M.P. Simelane Attorneys) |
| For the Respondents: | : | Mr. V. Kunene – Senior Crown Counsel<br>(Attorney General's Chambers) |