

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 343/08**

In the matter between:

**MICHAEL T. MNGADI**

**Applicant**

and

**THE BOARD OF TRUSTEES OF THE  
MOTOR VEHICLE ACCIDENT FUND'S  
PENSION FUND**

**1<sup>ST</sup> Respondent**

**KHULILE DLAMINI (N.O.)**

**2<sup>ND</sup> Respondent**

**CHARLES SUKATI (N.O.)**

**3<sup>RD</sup> Respondent**

**THE MOTOR VEHICLE ACCIDENT FUND**

**4<sup>TH</sup> Respondent**

**WALTER BENNETT (N.O.)**

**5<sup>TH</sup> Respondent**

**SYDNEY JELE (N.O.)**

**6<sup>TH</sup> Respondent**

**NOSISA SITHEBE (N.O.)**

**7<sup>TH</sup> Respondent**

**VUSI MABILISA (N.O.)**

**CORAM:**

**P. R. DUNSEITH : PRESIDENT**

**JOSIAH YENDE : MEMBER**

**NICHOLAS MANANA : MEMBER**

**FOR APPLICANT : S. KUBHEKA**

**FOR RESPONDENT : K. MSIBI**

**J U D G E M E N T – 17/11/2008**

---

1. The Applicant was in the employ of the Motor Vehicle Accident

Fund for a period of almost ten years as a Claims Manager. He was summarily dismissed on the 21<sup>st</sup> January 2008 for fraud.

2. During his employment the Applicant was a member of the Motor Vehicle Accident Retirement Fund, the 1<sup>st</sup> Respondent. This Retirement Fund is administered by an Underwriter under the supervision of a Board of Trustees. The 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents are the current Trustees. The administration of the Retirement Fund is governed by rules set out in a Policy issued by the Underwriter (hereinafter referred to as “the Rules”)
3. The 1<sup>st</sup> Respondent is a defined benefit fund – one which undertakes to provide its members with the benefits defined in the Rules. The primary benefit is a Normal Retirement Pension payable on retirement when the member reaches normal retirement age, defined as 2% of Final Pensionable Salary for each year of membership of the Retirement Fund. There are other benefits also: an Early Retirement Pension; Benefits on Death in Service; and Benefits on Withdrawal from Service where employment terminates other than on retirement or death.
4. In terms of the Rules, members of the Retirement Fund contribute 7% of their monthly salaries to the Fund and the Motor Vehicle Accident Fund as employer contributes 14%.
5. Since the Applicant’s employment terminated by way of

summary dismissal for fraud, the retirement benefit payable to him is defined under Part 6 of the Rules.

6. Rule 6.1 defines the general benefit on withdrawal from service as a lump sum amount equal to the member's contributions plus interest, increased by 10% for each year of employment up to the tenth year. Thus a member who resigns or is retrenched after 10 years of service is entitled to twice his own contributions plus interest.

7. Rule 6.1 is however qualified by Rule 6.2, which provides:

*"Where a member's employment with the [Motor Vehicle Accident Fund] terminated on ground of fraud or has been found guilty of gross misconduct warranting summary dismissal, the member shall only be entitled to his/her contributions with interest."*

8. Relying on Rule 6.2, the Retirement Fund paid out to the Applicant his own contributions plus interest, and refused for the time being to pay out any further increase or portion of the employer's contribution for the reason that the Applicant was dismissed on the grounds of fraud.

9. The Retirement Fund submits in its opposing affidavit that *"the employer's contribution has not been retained, but has merely been withheld pending a determination [by the courts] whether Applicant was fairly or unfairly dismissed."*

10. The Applicant argues that Rule 6.2 has no force or effect for two reasons:

- 10.1 the Rules of the Retirement Fund have not been approved and endorsed by the Registrar of Retirement Funds as required by section 13 (2) of the Retirement Funds Act, 2005; and
- 10.2 Rule 6.2 is in conflict with section 31 (1) of the said Act.

We shall deal with each of these arguments in turn.

#### APPROVAL AND ENDORSEMENT OF THE RULES

11. Section 13 (1) of the Retirement Funds Act, 2005 requires that the business of a retirement fund shall be governed by a set of rules which comply with the prescribed requirements in terms of Regulations made under the Act.
12. Section 13 (2) of the Act provides that *“no rules shall be of any force unless those rules have been approved and endorsed by the Registrar [of Retirement Funds] after consultation with the Minister.”*
13. The approval and endorsement of the 1<sup>st</sup> Respondent’s Rules is placed in issue by the Applicant for the first time in his Replying Affidavit.
14. This is a factual issue, and it should have been raised by the Applicant in his founding affidavit so as to give the Respondents a proper opportunity to deal with it.

15. On the evidence presently before us, it appears that the Registrar granted the 1<sup>st</sup> Respondent a Provisional Certificate of Registration valid until 31<sup>st</sup> August 2009, on condition that the 1<sup>st</sup> Respondent submits amended rules on or before 31<sup>st</sup> March 2009. It is not possible to infer from such registration alone whether the Registrar provisionally approved and endorsed the Rules subject to their subsequent amendment, or whether he has refused to approve and endorse the Rules until they have been amended. The former is more likely, since there would be no point in registering a Retirement Fund which had no rules.
16. The matter would in all likelihood have been comprehensively addressed by the Respondents if it had been squarely raised by the Applicant in his founding affidavit. For purpose of this judgement, we find that the maxim "*omnia presumuntur rite esse acta*" (everything is presumed to be rightly done) applies and it has not been shown that the Rules have not been duly approved and endorsed.
17. It would in any event be self-defeating for the Applicant to prove that the Rules are of no force or effect, since any entitlement he has to a retirement benefit arises from and is governed by the Rules themselves.

#### SECTION 31 (1) OF THE ACT

18. Section 31 (1) of the Act provides as follows:

“Save to the extent permitted by this Act, and the Income tax Order, 1975, no benefit or right thereto which arose in respect of contributions made by or on behalf of a member of a retirement fund, shall be capable of being reduced, transferred, ceded, pledged or hypothecated or be liable to attachment or subject to any form of execution under a judgement or order of court or be capable of being taken into account in the determination of a judgement debtor’s financial position.

19. The Applicant argues that this section operates to preclude the

1<sup>st</sup> Respondent from withholding the employer’s contributions when paying out his retirement benefit, because that amounts to reducing the benefit to which he is entitled. In his heads of argument, the Applicants representative submits that *“any restrictions on the disposal of pension benefits must be in terms of the Retirement Funds Act, 2005, the applicable statute, subject to the Income Tax Order, and no further retention on contributions is justifiable”* The Applicant prays for an order declaring that he is entitled to the Employer’s Contributions to the Retirement Fund and compelling the Respondents to pay the Employer Contributions to him.

20. The retirement benefits payable to the members of the Retirement Fund, and the rights of the members to such benefits, are defined and governed by the Rules of the Fund. The Rules constitute the contract between the members and the Retirement Fund.

21. The effect of section 31 (1) is to establish a general rule protecting retirement fund benefits, and the right to such benefits, from being interfered with or reduced by means of

inter alia deductions, encumbrances, attachment or execution. Section 31 (1) applies to the benefits as defined in the Rules. The section does not purport to prescribe what benefits should be paid to members, nor does it purport to prohibit a retirement fund from defining the circumstances and conditions under which such benefits become payable.

22. The Rules of the Motor Vehicle Accident Retirement Fund do not provide for the payment of the total Employer's Contributions to a member in any circumstances, neither on retirement nor on death nor on any other kind of withdrawal from the Fund. No such benefit is defined in the Rules.
23. If the interpretation of section 31 (1) advanced by the Applicant were to be adopted, it would effectively prevent the operation of defined benefits retirement funds. It would mean that in all circumstances regardless of the rules of the Fund, a member leaving the Fund would be entitled to repayment of the total accumulation of member and employer contributions and investment returns thereon. It would render meaningless all provisions in the Rules whereby benefits payable to member are defined.
24. If the legislature has intended such a result, it would have provided that the **total interest** (as defined in the Act) may not be reduced, not the **benefit or right thereto**.
25. The Respondent's counsel submits that a retirement benefit is not right, it is an incentive and a reward for good performance. We reject this submission. In the United

Kingdom, pension benefits have long been recognized as remuneration, or part of the quid pro quo, in the employment relationship. The South African courts affirmed the position that pension benefits are part and parcel of the costs 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 & Jithoo: 'The Pension Promise: Pension Benefits and the Employment Contract' (2003) 24 ILJ 1** and the cases there cited **Adjudicator & Others (2002) 21 ILJ 1947** the court accepted that pensions rights amount to deferred pay rather than gratuities bestowed within the benevolence of the employer.

We also agree with the Applicant's representative that a rule which operates to deprive a longstanding employee of a major proportion of his withdrawal benefit, in the event of his dismissal for gross misconduct, is harsh and punitive. Nevertheless, this is a condition of the contract which was acceded to by the Applicant when he became a member of the Retirement Fund, and in our finding section 30 (1) of the Act does not render such a condition illegal or unenforceable.

26. The purpose of section 30 (1) is to ensure that members of a retirement fund receive the benefits due to them in terms of the retirement fund rules. In the present case of the Applicant, the benefits due to him are defined in Rule 6.2 (subject to the determination of the unfair dismissal dispute he has reported).

27. In the premises, the application must fail. We make the following order:

The application is dismissed with no order as to costs.

The members agree.

**PETER R DUNSEITH**  
**PRESIDENT OF THE INDUSTRIAL COURT**