

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 457/08

In the matter between:

DHL EXPRESS SWAZILAND LTD

Applicant

and

NOMSA BULUNGA

Respondent

In Re:

NOMSA BULUNGA

Applicant

and

DHL EXPRESS SWAZILAND LTD

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : L. MNGOMEZULU

FOR RESPONDENT : V. NDZINISA

JUDGEMENT - 19/12/08

1. The Respondent reported an unfair dismissal dispute against her former employer the Applicant to CMAC. Consequent to conciliation the parties entered into a written memorandum of agreement on the 16th August 2006 in which they recorded the terms of the settlement of the dispute as follows:

“The parties hereby agree that the Respondent [the present Applicant] pays to the Applicant [the present Respondent] the sum of E40,389-50 being in respect of severance allowance (25, 597-50) and 4 months salary (14, 792-00). The Applicant will also be paid her contributions from the pension scheme. Both parties agree and acknowledge that this agreement is in full and final settlement of this matter and all other claims arising out of their employment relationship. Payment to be made on or before 31 August 2006.”

2. On the application of the Respondent the memorandum of agreement was made an order of the Industrial Court on the 7th October 2008.
3. The Applicant alleges that it duly paid the amount owing to the Respondent in terms of the memorandum of agreement in 2006 but the Respondent has recently issued out a writ of execution against the Applicant for payment of the sum of E14,527-25.
4. The Applicant has brought an urgent application asking the court to grant a final order:
 - 4.1 Declaring that the Applicant has complied with the agreement of settlement entered into between the parties on the 16th August 2006 at CMAC; and
 - 4.2 Interdicting the deputy-sheriff, Hhohho or anyone acting on his behalf from executing the writ of execution issued in the above matter.
5. The Applicant alleges, and it is common cause, that it paid the Respondent a sum of E26,132-25 as part payment of the settlement

amount of E40,389-50 on the 30th August 2006. This left a balance of E14, 257-25 due and payable to the Respondent.

6. To cater for payment of this balance, the Applicant alleges that it instructed the administrators of its pension scheme, Messrs Glassock Financial Services Consultants, to pay to the Respondent both the employer and the employee's contributions to the pension scheme. The employer contribution amounted to E14,257-25 i.e. the balance due to the Respondent under the memorandum of agreement.
7. Messrs Glassock Financial Services Consultants duly calculated the pension withdrawal benefit payable to the Respondent by the pension scheme, as follows:

Member contribution	E15 272-30
Company contribution	E14 257-25
Plus interest/growth	<u>E16, 951-58</u>
Respondent's Share of Fund 31 July 2006	<u>E46, 481-13</u>

8. After deducting tax amounting to E15,338-78, Messrs. Glassock Financial Services Consultants paid the nett benefit of E31,142-35 to the Respondent on the 3rd October 2006.
9. The Applicant submits that it has paid the Respondent all that is due to her, for the reason that:
 - 9.1 the memorandum of agreement provides for the Respondent to be paid only her contributions from the pension scheme;
 - 9.2 the amount of E14,257-25 included in the calculation of the

Respondent's pension withdrawal benefit refers to the employer contribution, to which the Applicant was not entitled;

9.3 the said amount of E14, 257-25 was paid to the Applicant in settlement of the balance owing under the memorandum of agreement.

10. The Applicant handed into court the consolidated rules of its pension scheme, namely the DHL Provident Fund. Rule 9 provides for the withdrawal benefit payable to a member of the Fund who leaves the service of the Applicant due to dismissal, as in the case of the Respondent. In terms of Rule 9.1.1 such member is entitled to a return of the member's Fund Credit. The Rules define 'Fund Credit' as meaning *"the accumulated value of the contributions, transfers and additional voluntary contributions made by the Employer and Employee in respect of the Member, as equitably determined by the Trustees....."* In terms of the Rules, there can be no doubt that the Respondent was entitled to be paid both the employer and the employee contributions to the pension scheme.

11. Rule 20.1 provides further that *"no benefit or right to such benefit provided for in the Rules, or right in respect of contributions made by or on behalf of a Member, shall be capable of being reduced, transferred or otherwise ceded or of being pledged or hypothecated or be liable to be attached or be subject to any form of execution under a judgement or order of a court of law....."*

12. In terms of Rule 20.1, the DHL Provident Fund was prohibited from entering into any arrangement with the Applicant whereby the pension withdrawal benefit payable to the Respondent, or any portion thereof, could be reduced or set off against the terminal benefits which the Applicant had agreed to pay the

Respondent in terms of the settlement agreement. Indeed, there is no evidence in the papers filed of record that the Fund agreed to any such arrangement. From the correspondence it appears that the Fund correctly calculated the benefit payable to the Respondent, inclusive of the employer and the employee contributions, and paid such benefit directly to the Respondent.

13. The Respondent has received her pension entitlement from the DHL Provident Fund. She has not however received the full amount which the Applicant agreed to pay her in terms of the settlement agreement. Payment of an amount of E14,257-25 is still outstanding.

14. It does not avail the Applicant to rely on the provision in the settlement agreement that “[t]he Applicant will also be paid her contributions from the pension scheme”. Firstly, the agreement refers to ‘her contributions from the pension scheme’, not ‘her contributions to the pension scheme’. The agreement confirms that the Applicant will, in addition to her severance allowance and four months salary, also be paid the contributions to which she is entitled from the pension scheme. If the Applicant intended to compromise the Respondent’s pension withdrawal benefit and deprive her of a major portion of her entitlement, as it now alleges, the language of the agreement does not express this. Secondly, the Applicant had no right to compromise the Respondent’s pension entitlement. Such entitlement was a matter between the Respondent and the DHL Provident Fund, and was governed by the rules of the Fund. The rules expressly forbid any arrangement to reduce the Respondent’s entitlement.

15. The Applicant is not entitled to the declaratory order it seeks, nor to an interdict against execution. Although there is some dispute as to whether a writ of execution has already been issued, there is no reason why the Respondent should not proceed with execution to recover the balance of the judgement debt.

16. The application is dismissed with costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT