IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

CASE NO. 32/2013

MAGDELINE VIOLET THRING **APPLICANT**

And

DUNNS SWAZILAND **RESPONDENT**

Neutral citation: Magdalene Violet Thring Vs Dunns Swaziland (32/2013) [2013] SZIC 37 (29th November 2013)

CORAM: D. MAZIBUKO **J**

(Sitting with A. Nkambule & M.T.E. Mtetwa) (Members of the Court)

Heard **:** 13th June 2013

Delivered **:** 29th November 2013

Summary: *Labour law: Severance allowance is payable when the services of an employee are unfairly terminated by the employer.*

An employer who retires his employees prematurely, is guilty of an unfair dismissal and is liable for payment of severance allowance.

A retirement of an employee on due date is not a termination by the employer, but a termination by effluxion of time. Section 34 (1) of The Employment Act does not apply on a termination of employment by retirement.

1. The Applicant Magdalene Violet Thring was employed by the Respondent on the 1st November 1986, as a Regional Sales Manager. The Respondent is Dunns Swaziland, a company incorporated and trading as such in Swaziland.

2. The Applicant's claim is for payment of severance allowance. The claim reads as follows:

" 1. Declaring that the Respondent is in breach of Section 34 (1) of the Employment Act of 1980.

2 Directing the Respondent to pay the Applicant her severance allowance amounting to E286,800-00 (Two Hundred & Eighty Six Thousand Eight Hundred Emalangeni) computed in the following manner:
*(E1195-00*240 days = E286,800-00.*

3 Granting costs of this Application."

Before the matter was argued, the Applicant amended his claim in prayer 3 so that it reflects that she is now claiming costs at attorney and own client scale.

3. The Applicant states in her affidavit that she worked for the Respondent from 1st November 1986 to 28th February 2012, whereupon she retired. Her salary at the time of retirement was E23,901-00 (Twenty Three Thousand Nine Hundred and One Emalangeni). When the Applicant retired, she demanded payment of severance allowance. The Respondent denied liability and consequently refused to pay.

4. The Respondent's denial of liability for payment of severance allowance is based on the argument that she did not terminate the employment contract. She agued that it is the Applicant who terminated the employment contract on the 28th February 2012. The Respondent's understanding of the legal position is that severance allowance is payable, inter alia, where the employment contract is terminated by the employer.

Section 34 (1) of The Employment Act No. 1 of 1980 as amended, reads as follows;

> *"34 (1) Subject to subsections (2), and (3) if the services of an employee are terminated by his employer other than that under paragraphs (a) to (j) of section 36 the employee shall be paid, as part of the benefits accruing under his contract of service,*
>
> *a severance allowance amounting to ten working day's wages for each completed year in excess of one year that he has been continuously employed by that employer. (Amended) A. 11/1981; A.4/1985.)*

Sections 34 (2) to 34 (5) deal with the method of calculating severance allowance and matters incidental thereto, they are not relevant for the determination of the matter before Court.

5. There are two (2) requirements in section 34 (1) of The Employment Act which must be satisfied in order for an employee to claim severance allowance, namely -

5.1 the services of the employee must be terminated by his employer, and

5.2 the termination must be for a reason other than that stated in paragraphs a) to j) of section 36 of The Employment Act.

6. The Applicant has based her claim for payment of severance allowance on retirement. She stated that she retired on the 28th February 2012. In support of her claim for payment of severance allowance , the Applicant has invoked section 34 (1) as read with section 36 (k) of The Employment Act. Section 36 (k) reads as follows;

"36. It shall be fair for an employer to terminate the services of an employee for any of the following reasons-

(a) ---
(b) ---

(c) ---
(d) ---
(e) ---
(f) ---
(g) ---
(h) ---
(i) ---
(j) –
(k) because the employee has attained the age which in the undertaking in which he was employed is the normal retiring age for employees holding the position that he held;"

7. At the time the Applicant was employed, the retirement age at the Respondent's undertaking was 65 years. However, in the year 2011 the Respondent reduced the retirement age to 63 years. There is no indication in the answering affidavit whether the former retirement age or the subsequent amendment was ever communicated to the Applicant. The Applicant has stated that she was not aware of either the former or the current retirement age. The Applicant does not state what steps, if any, did she take to familiarize herself with the retirement policy of the Respondent.

8. According to the Respondent , the Applicant reached the retirement age of 65 years on the 9th December 2006. The Applicant then requested that she should not be placed on retirement,
but be allowed to continue to work for the Respondent. The answering affidavit reads as follows:

"4.4 The Applicant reached the Respondent's retirement age of 65 years on the 9th December 2006. However, the Applicant requested the Respondent not to place her on retirement as she wished to continue in its employ. The Respondent acceded to the Applicant's request ."

(Record page 17)

9. The Respondent's evidence - clearly indicates the following:

9.1 That on the 9th December 2006, both parties became aware of the Applicant's right to retire.

9.2 The parties entered into an agreement which entitled the Applicant to continue to work for the Respondent in the same position, after the 9th December 2006.

10. The Applicant's version differs materially from that of the Respondent.

10.1 The Applicant denies that she was made aware of the retirement age that applied at the Respondent's workplace. She was also not aware of the subsequent amendment which took place in the year 2011, in terms of which the Respondent reduced the retirement age to 63 years.

10.2 The Applicant further denies that she made a request that the Respondent should not retire her on the 9th December

2006 , and further that she should be permitted to continue to work beyond the retirement date.

10.3 According to the Applicant: no discussion ever took place with the Respondent concerning her retirement, either on the 9th December 2006 or at all. The only discussion that the Applicant acknowledges to have been involved in – with the Respondent, was in the year 2012, and this was when she left her employment.

11. According to section 34 (1) as read with 36 (k) of the Employment Act, an employee whose services are terminated by the employer on the claim that the employee is being retired, is entitled to payment of severance allowance . The duty of the Court therefore is to find a meaning of section 34 (1) as read with 36 (k).

12. It is common cause between the parties that the Applicant was born on the 9th December 1941. She therefore turned 65 years on the 9th December 2006. The Applicant was accordingly entitled to proceed to retirement on the 9th December 2006, in accordance with the Respondent's retirement policy.

13. The Applicant did not retire on the 9th December 2006. The parties have different versions of what transpired in December 2006 regarding their employment relationship.

14. The Respondent's version is that: when the Applicant was due for retirement, she requested that the existing employment contract

should continue. The Respondent granted the Applicant's wish. As a result, the Applicant continued working for the Respondent until she reached the age of 70 years. If the Applicant had not made such a request, she would have retired at the age of 65 years, and left the Respondent's workplace. The Applicant denies the alleged agreement. She further denies that she made the alleged request. According to the Applicant, she was not aware that she was entitled to retire at the age of 65.

15. The Court has some difficulty with the Respondent's argument concerning the alleged agreement, for reasons stated below:

15.1 The statement containing the alleged agreement is contained in the answering affidavit of the Respondent , which was deposed to by Mr Shane Symcox. Mr Symcox described himself as the Human Resources Director of the Respondent. Mr Symcox does not allege that he represented the Respondent in the negotiation or that he witnessed- when the alleged agreement was concluded, alternatively by some other means he has personal knowledge of the existence of the alleged agreement.

15.2 Mr Symcox does not state where and when exactly was that agreement concluded, and who was present in the negotiation. If that agreement was in writing, there is no indication why a copy was not presented to the Court. Alternatively,
if that agreement was oral, the full terms and conditions thereof have not been stated. There is no explanation why

the terms of that agreement, (if oral) were not subsequently confirmed in writing. The Respondent had the means to confirm - in writing, the terms and conditions of an oral agreement, (provided that agreement existed).

15.3 If Mr Symcox did not represent the Respondent at the conclusion of the alleged agreement , he has failed to state who then represented the Respondent and how he (Mr Symcox) came to know about the alleged agreement and the terms thereof.

15.4 Mr Symcox does not state in his affidavit whether or not he was already employed by the Respondent on the 9th December 2006 and if so, in what capacity. The fact that Mr Symcox is currently employed as the Respondent's Human Resources Director, does not assist the Court or the Applicant regarding the circumstances relating to the conclusion of an agreement which allegedly occurred in December 2006.

15.5 Mr Symcox has attached to his affidavit (answering affidavit) 2 (two) supporting affidavits of fellow employees- namely, Mr Anton De Beer and Mr Josienne Eden Rabie. Both gentlemen have stated, in their individual supporting affidavits,

that they have read the answering affidavit of Mr Symcox and confirm its contents in so far as it relates to each of them.

The only time that Mr Symcox referred (in the answering affidavit) to Mr De Beer and Mr Rabie was when he mentioned a meeting of the 27th September 2011 which took place between the Applicant, Mr De Beer and Mr Rabie. Mr Symcox was not present at that meeting, yet he has referred to that meeting in detail in the answering affidavit. It was necessary therefore for Mr Symcox to get supporting affidavits of Mr Rabie and Mr De Beer to confirm what he (Mr Symcox) had alleged in the answering affidavit.

15.6 Mr De Beer and Mr Rabie did not confirm the existence of an agreement which Mr Symcox alleged was concluded between the Applicant and the Respondent in December 2006.

16. The Applicant has clearly denied the existence of the alleged agreement. The Applicant stated as follows in her replying affidavit concerning this issue;

"9.1 I specifically deny that I requested the Respondent not to place me on retirement and on the contrary there was no talk of retirement."

"9.2 In any event even if I did which is denied, this could only be interpreted as postponing my retirement age by consent."
(Record Page 27)

17. The Respondent was notified in the replying affidavit, that the Applicant has denied the existence of the alleged agreement. The

Respondent had ample time therefore to apply for leave of Court to file a supplementary affidavit. In the supplementary affidavit, the Respondent would have had an opportunity to provide evidence to support its claim for the said agreement. The Respondent has failed to provide the necessary evidence. Without the supporting evidence, the Respondent`s claim to the existence of an agreement must fail.

18. The Respondent bears the onus to prove the existence of the agreement she alleges. The legal maxim provides that " *he who alleges must prove*". The Respondent has failed to discharge that onus.

19. The Applicant has further filed a replying affidavit and has attached to it the supporting affidavits of 2(two) of the Respondent's former employees. Both of these witnesses were senior to the Applicant; namely Yvette Sylvia Ingram and Rosalyn Joan Webber.

20. Mrs Yvette Ingram stated in her affidavit that, between April 2004 to July 2007 she worked for the Respondent as the Human Resources Manager for the Nor thern Division of the Respondent's business. The Northern Division included the Swaziland branch. The Applicant was stationed in the Swaziland branch. The Applicant worked under the supervision of Mrs Ingram.

21. Mrs Ingram has denied the Respondent's allegation, particularly that the Applicant requested that she should not be placed on

retirement, but that she should be allowed to continue working for the Respondent after the retirement date. Mr Symcox has stated in the answering affidavit that it was this request which led the parties to conclude an agreement which resulted in the Applicant working up to the age of 70.

22. According to Mrs Ingram, had the Applicant made such a request, alternatively had such an agreement existed, she would have known about either of these incidents, since the Applicant's administrative affairs were handled by her office as Human Resources Manager. Instead, it was the Respondent who repeatedly stated, in the Regional Manager's meetings as well as at annual conferences, that the Respondent could not afford to lose the Applicant, because of her skill and expertise in running the Respondent's business. The Applicant was referred to as a matriarch of the Company.

23. Mrs Webber also confirmed that had the Applicant made the alleged request, alternatively had such an agreement as alleged by Mr Mr Symcox existed, she also would have known about those incidents since those matters would have been discussed at the Regional Manager's meeting. In short these 2 (two) witnesses testify and support the statement that the alleged agreement could not have been concluded in secret.

They would have known about the alleged agreement because it involved a senior employee of the Respondent who was stationed at the Swaziland branch, which branch they supervised.

24. The Respondent has not challenged the evidence of Mrs Ingram and Mrs Webber. The Respondent could have applied for leave to file a supplementary affidavit, if they saw the need to challenge the evidence of these 2 (two) witnesses. Both Mrs Ingram and Mrs Webber were senior employees of the Respondent at the material time i.e. December 2006. It is not in dispute that Mrs Ingram as Human Resources Manager (Northern Division), was in charge inter alia, of the administrative matters relating to the personnel in the Swaziland Branch – including the Applicant. She had authority to access and examine the applications and requests, as well as the agreements and administrative transactions, in the Applicant's file. She would have known about the alleged agreement, if it existed. The Respondent should have explained why and how the alleged agreement (if it existed), bypassed Mrs Ingram. There is no allegation that the evidence of Mrs Ingrams or that of Mrs Webber is incorrect or incomplete. There is no explanation from the Respondent why 2 (two) of its senior managers would contradict the evidence of their former employer (Respondent) and support a junior employee. The Court accepts Mrs Ingram's and Mrs Webber's evidence as credible.

25. The conclusion is inescapable that the evidence of Mr Symcox, where it relates to an agreement that allegedly was concluded in December 2006, between the parties, is incorrect and is accordingly rejected. The Court is also persuaded that the reason the Respondent failed to place the Applicant on retirement on the 9th December 2006 is

because the Respondent needed the Applicant's services. The Applicant had acquired expertise in her work and was therefore a valuable employee to the Respondent. The Respondent's claim that she concluded an agreement with the Applicant in the year 2006 fails for this reason as well.

26. Even if the Respondent was successful in proving the existence of the alleged agreement, (which is not the case), that agreement would not have assisted the Respondent regarding the implementation of section 34 (1) of the Employment Act. The basis for the liability for payment of severance allowance is governed by statute and not by contract. The statutory requirements cannot be superseded by contract, (see section 3 of The Employment Act).

27. When an employee retires from work, the employment contract thereby terminates automatically or by effluxion of time. Even though a retirement has the effect of terminating the employment contract, it is not a dismissal. The Courts as well as the learned authors have stated the principle as follows:

27.1 "*The labour Court has fairly consistently adopted the view that when an employee reaches the normal or agreed retirement age, the contract of employment expires automatically , and the termination of employment in these circumstances does not constitute a dismissal… .*"

ANDRE' VAN NIEKERK: UNFAIR DISMISSAL, 4th edition, 2008 (SIBER INK) ISBN 978-1 – 920025 24- 3 at page 28.

27.2 "Where a contract comes to an end because the employee has reached the agreed or the normal retirement age, the courts do not regard the termination as a dismissal … ."

JOHN GROGAN : WORKPLACE LAW, 10th edition, 2009 (Juta and Co) ISBN 13: 978-0- 7021- 8185 – 6 at page 146.

27.3 "No contract of employment lasts indefinitely. Contracts of employment end either with the death of the employee or when the employee reaches the age of retirement."

JOHN GROGAN : DISMISSAL, 2010 (Juta and Co)
ISBN 13:978- 0 -7021-8486-4 at page 24.

27.4 In the matter of SCHAMAHMANN VS CONCEPTS COMMUNICATIONS NATAL (PTY) LTD (1997) 18 ILJ 1333 (LC), the employee was retired by her employer on due date, (at the age of 65 year).

The employee claimed payment of severance allowance. The Court stated the legal principle as follows, at page 1334:

"When an employer and an employee agree specifically or by implication (retirement or normal retirement age) in advance that the effluxtion of time is to operate as a guillotine which severs their

employment relationship, then it cannot be said that when this date arrives there has been a dismissal by the employer although the relationship and the contractual obligation are terminated."

27.5 Furthermore, in the Schamahmann case the Court added the following at page 1340:

"… when one reaches a retirement age the employment relationship terminates. In my opinion this is so whether it is an agreed age or the normal retirement age. The services are terminated and this termination does not constitute a dismissal.

27.6 In the matter of PHILEMON KUNENE VS SWAZI OXYGEN (PTY) LTD SZIC 335/2000 (unreported) the employee retired on due date . Thereafter, the employee claimed payment of additional notice on the basis that the employer has terminated the employment contract when it placed her on retirement . The Court stated the legal position as follows at page 4 of the judgment:

27.6.1 *"It is clear therefore that where an employee reaches the agreed retirement age, the contract of employment terminates automatically."*

27.6.2 *"In the present case neither party terminated the employment relationship. It terminated automatically upon the arrival of the retirement date."*

28. This Court respectfully agrees with the principle as stated in the authorities cited above. The legal position is clear that : where an employee retires on the agreed or normal retirement date, the contract of employment terminates automatically or by effluxion of time. That being the case , it cannot be said that, that employee has been dismissed by the employer. It would be a contradiction in terms to say on the one hand: that a particular employee has retired and left work, and further say on the other hand: that the same employee has left work because he was dismissed.

29. In this matter, the parties did not agree on a retirement date when they concluded their contract of employment. It is however common cause that the retirement date at the Respondent's undertaking, at the material time, was 65 years. The retirement policy that is applicable in a business undertaking must be read in conjunction with the other terms of the employment contract applicable to each individual employee. The Applicant reached normal retirement age on the 9th December 2006.

Accordingly, the employment contract between the parties terminated automatically or by effluxion of time on the 9th December 2006, upon the retirement of the Applicant.

30. It is common cause between the parties that after the retirement date, the Applicant continued to work for the Respondent on similar terms that applied before retirement. That meant that a new contract of

employment came into existence by conduct, which governed the relationship between the parties after the retirement date.

31. When the legislature drafted Section 34 (1) as read with 36 (k) of The Employment Act, they had in mind a situation where the services of an employee are terminated by the employer prematurely, under the guise that the employee has retired. The legislature saw a need to protect employees against forced or premature retirement. In a case where the employee has been retired prematurely,
severance allowance is payable - since the employer's conduct amounts to an unfair dismissal, though disguised as a retirement.

32. Where the employer terminates the services of an employee, the Court will look at the reason behind the termination, irrespective of the title or legal maxim used as well as the rule or statutory provision cited - to justify that termination. The Court is satisfied in this case, that the Respondent did not terminate the services of the Applicant. There is no action or step that was taken by the Respondent to terminate the services of the Applicant. The Applicant retired technically on due date i.e. 9th December 2009.
There is no question of a forced or pre-mature retirement. After the retirement date the parties were at liberty to conclude a new contract of employment, which they did by conduct, and it was later terminated by the Applicant. Accordingly, Section 34 (1) of The Employment Act does not apply. The Applicant's claim accordingly fails for this reason.

33. It is noted that Section 36 as read with sub-section 36 (k) is somewhat confusing. The statute creates an impression that when the services of an employee terminate on account of retirement, that termination amounts to a dismissal by the employer, albeit a fair dismissal. That thinking is inconsistent with the legal position as expressed by both the Courts and learned authors, as stated in the preceding quotations. Obviously, there is a drafting error in Section 36 as read with 36 (k) which must be urgently attended to, by the legislature.

34. The effect of payment of severance allowance is two fold :-

34.1 it provides a financial penalty against the employer for terminating the services of an employee unfairly, and

34.2 it also provides the dismissed employee a financial contribution to alleviate the harsh consequences related to loss of employment.

35. Since section 36 as read with 36 (k) provide that a retirement amounts to a fair dismissal of the employee by the employer, it means there is no wrong doing on the part of the employer when the employee retires. Section 34 (1) then does not apply since the employer is not guilty of an unfair dismissal in a case of a retirement. It will not make sense to penalise an employer by ordering payment of severance allowance in terms of section 34 (1) in a case where there is absence of wrong doing on the part of the employer. The Court

reiterates therefore that section 36 as read with 36 (k) needs urgent amendment.

36. The general rule is that costs follow the event. The Respondent has succeeded in resisting the Applicant's claim for payment of severance allowance. The Respondent has however, unnecessarily escalated legal costs in this matter by introducing a defence based on a contract which clearly has no supporting evidence. The Applicant has incurred unnecessary costs in challenging the alleged agreement. The lack of evidence to support the Respondent's claim to the alleged agreement was foreseeable to the Respondent even at the time of drafting the answering affidavit. The Respondent knew therefore that they were presenting before Court a defence which has no evidential support. It would be fair therefore for each party to pay its costs.

37. Wherefore the Court orders as follows:

37.1 The application is dismissed.

37.2 Each party is to pay its costs.

Members agree

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D. MAZIBUKO

INDUSTRIAL COURT- JUDGE

Applicants' Attorney:	Mr M. Sibandze
	M.S. Sibandze Attorneys
Respondent's Counsel :	Adv. P. E. Flynn
	Instructed by Dunseith Attorneys