



IN THE INDUSTRIAL COURT OF SWAZILAND
JUDGEMENT

CASE NO. 234/2014

In the matter between:-

DON BOSCO GININDZA & 73 OTHERS

1ST APPLICANT

AND

THE CIVIL SERVICE COMMISSION

1ST RESPONDENT

THE MINISTRY OF PUBLIC SERVICE

2ND RESPONDENT

**THE MINISTRY OF PUBLIC WORKS &
TRANSPORT**

3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

Neutral citation : *Don Bosco Ginindza & 73 Others v The Civil Service Commission & 3 Others (234/2014) [2015] SZIC 24 (26 May 2015)*

CORAM : **DLAMINI J,**
*(Sitting with D. Nhlengetfwa & P. Mamba
Nominated Members of the Court)*

Heard : **14 JANUARY 2015**

Delivered : **26 MAY 2015**

Summary: Labour law – Severance allowance – Payment of Severance allowance in terms of the Employment Act 1980 – Held: Employers obliged to pay severance allowance when services of the employee are terminated at the instance of that employer - Leave pay - it is peremptory that civil servants take all their vacation leave

earned within a leave year and before the dawn of a new leave year except in extreme individual cases –
Held - *the Applicants in casu have not explained reasons for the non-utilisation of their leave days their claim in this respect therefore fails.*

1. As a prologue to this judgement, the Court deems it to be of paramount legal importance that it starts off by referring to section 34 (1) of the Employment Act, as amended, which reads thus:-

“Subject to subsections (2) and (3) if the services of an employee are terminated by his employer other than under paragraphs (a) to (j) of section 36 the Employee shall be paid, as part of the benefits accruing under his contract of service as Severance Allowance amounting to 10 working days’ wages for each completed year in excess of one year that he has been continuously employed by that employer.”

2. Now, this present application of Don Bosco Ginindza and 73 of his colleagues is on the payment of severance allowance as encapsulated in our Employment Act. Ginindza and his colleagues have come to this Court by way of Notice of Motion for an order declaring that they are entitled to be paid their outstanding severance allowance in terms of the above quoted section 34 (1) of the Employment Act 1980, together with their outstanding leave.

3. The common cause facts of this matter are as follows; Don Bosco Ginindza and the other Applicants were employed by the Swaziland Government in various positions on different engagement dates. They were on the permanent and pensionable establishment of the Swaziland Government. Then on or about the 01st January 2012 their services with the Swaziland Government were terminated and they were then employed by the Civil Aviation Authority, a new parastatal created in terms of the Swaziland Civil Aviation Authority Act of 2009.

4. Don Bosco Ginindza, the deponent to the founding affidavit of the Applicants, further states that at the time of the termination of their services the Swaziland Government was obliged to pay each of the Applicants in respect of their outstanding leave days and their severance pay. However, and much to their astonishment, the Swaziland Government only paid them for days worked up to the end of the month of January 2012, which payment was later reclaimed by the Government from their new employer, the Swaziland Civil Aviation Authority – SWACAA. The Applicants have now come before this Court for redress in respect of their claims for the severance and outstanding leave pay.

5. The Swaziland Government opposes the application of the Ginindza and his colleagues. In opposition thereof the Principal Secretary in the Ministry of Public Works and Transport has deposed to the Respondents' answering affidavit in which he brings to the fore the Swaziland Government's defence to the claims of the Applicants.

6. In respect of the claim for outstanding leave he states that the Swaziland Government is under no obligation to pay the Applicants for their outstanding leave because they have not stated why such leave was not utilised in the first place. He further states that in terms of the General Orders leave not taken when it is due to be so taken is forfeited except in circumstances where the exigencies of the service require an officer not to utilise same at that particular time. He quickly points out though that it is the Head of Department who determines whether or not there are such exigencies. Kunene also states that payment in respect of leave can only be effected where there is proof that the leave was applied for but refused by the Head of Department due to exigencies of the service.

7. Then on the severance allowance Principal Secretary Kunene deposes that Ginindza and the 73 other Applicants' services were terminated on abolition

of office which then rendered them redundant. He therefore submits that in terms of section 34(1) of the Employment Act, severance allowance is not payable to an employee whose services are terminated on account of redundancy. In any event, Principal Secretary Kunene goes on, the Applicants were paid gratuity in terms of regulation 12 of the Public Service Pension Fund Regulations of 1993 when their services were terminated. He then refers to section 34(3) of the Employment Act which he states reveals that had the Government paid severance allowance to the Applicants then it would be entitled to its contribution to the Pension Fund in respect of each of the Applicants. He points out that in respect of the Applicants Government did not get its contribution to the Pension Fund as they (Applicants) got all the benefits. Kunene states that it is totally unreasonable therefore for the Applicants to expect to be paid severance allowance as well in the circumstances. As far as Kunene is concerned the Applicants were paid all their benefits as per the law. He further denies that there was any money reclaimed by the Swaziland Government from the Swaziland Civil Aviation Authority as alleged by the Applicants.

8. In his submissions and arguments in support of the Applicants' case, Attorney Lukhele pointed out that the creation of the Civil Aviation

Authority, through the promulgation of the Swaziland Civil Aviation Authority Act of 2009, necessitated the abolishment of the Applicants' posts within the Civil Service. Lukhele further argued that in terms of section 34(1) of the Employment Act there are two requirements that must be satisfied in order for an employee to claim severance allowance; *a) the services of the employee must be terminated by his employer and b) that the termination must be for a reason other than those stated in paragraphs (a) to (j) of section 36 of the Employment Act.*

9. In support of his contention on the payment of severance allowance Lukhele then referred the Court to the authority of the ***Samuel Zikalala v Jomar Investments (Pty) Limited t/a Shamrock Butchery IC Case No 672/2006*** where the then Judge President Dunseith JP had this to say;

“It must be presumed that Parliament enacted section 34(1) of the Employment Act after carefully considering the circumstances under which severance allowance should be payable to employees upon termination of service. Section 34(1) expresses a legislative policy that employers should be liable to pay terminal benefits only in circumstances where the services of the employee have been terminated by the employer without fault on the part of the employee. The extension of liability to circumstances beyond the control of the employer involves a substantial revision of legislative policy.”

10. In respect of the Applicants' claim for leave, Attorney Lukhele conceded that the Applicants have not given reasons why they did not utilise their leave days. He implored the Court though to exercise its discretion in favour of the Applicants on this issue in deciding whether or not they should be paid for the unutilised leave days.

11. In support of the Respondents' case Attorney Nkhambule conceded that indeed it is common cause that the termination of the Applicants' services was as a result of the abolishment of their positions. In this regard she referred the Court to one of the letters of termination which is headed **'TERMINATION OF SERVICES IN TERMS OF ABOLISHMENT OF OFFICE – YOURSELF.'** The Respondents' counsel further stated that since the termination of the Applicants was as a result of the abolishment of their positions it follows therefore that such termination was on the basis of redundancy of their posts in terms of section 40 of the Employment Act 1980. It was the Respondents' counsel's further contention that even this termination on the basis of redundancy was itself procedurally and substantively fair as it was conducted in accordance with the Employment Act. It is on that basis therefore that the Respondents contend that the Applicants are not entitled to the payment of severance allowance. The

understanding here being that the Swaziland Government is not liable to pay the Applicants because they were terminated in terms of section 36(j) of the Employment Act.

12. On the leave pay as claimed by the Applicants, the Respondents argue that the Applicants have not stated why they did not utilise their leave days. In this regard the Court was referred to General Order A.306(1). This General Order, Attorney Nkhambule submitted, provides that an officer who has proceeded on approved vacation leave shall be required to take all leave granted to him, unless he is recalled to duty by his head of department before the expiry of such leave. And if an officer on his own volition curtails his leave, such curtailment may entail forfeiture. Further to this, the General Orders apparently provide that an officer shall be required to take all vacation leave earned within a leave year before he begins a new leave year. And that if an officer on his own volition chooses not to utilise all vacation leave earned within a vacation year then he shall forfeit it. That was the case of the Respondents in defence of the claims by the Applicants.
13. The critical question for determination by this Court in relation to the payment the severance allowance, as claimed by the Applicants, is whether

the termination of their services was at the instance of the employer. In other words, what the Court needs to ask is whether the termination of the Applicants can or cannot be attributed to any fault on the part of the now Applicant employees? If the answer to this question is that the termination is not attributable to any fault on the part of the employees then the employer is obliged to pay the severance allowance. However if on the other hand the termination is attributable to the employees then the employer is under no such obligation to pay the severance allowance. In this regard this Court will quote the sentiments of the Industrial Court of Appeal in ***Magdelene Violet Thring v Dunns Swaziland ICA Case No. 08/2013*** when it stated thus at page 15 paragraph 20;

“...It is for this reason that we are of the view that Severance Allowance will be payable in terms of the Act only in those instances where realistically the termination of an employee’s services was at the instance of an employer...”

14. Now, in this matter before us, the evidence at our disposal is to the effect that the termination of the present Applicants’ services was as a result of the abolishment of the Directorate of Civil Aviation (DCA) unit. This abolishment was at the instance of the Swaziland Government and was meant to give way to the establishment of the Civil Aviation Authority

(CAA) unit. The abolishment of the DCA and subsequent establishment of the CAA was at the instance of the employer, the Swaziland Government. This abolishment and establishment of these two units was through no fault of the present Applicant employees. What the Court has noted is that what transpired after the promulgation of the Act which established the CAA was that the Government negotiation team then engaged the civil servants associations of the affected employees and subsequently entered into and signed a collective agreement for the transition of staff from the DCA to the CAA. This was only after the promulgation of the Civil Aviation Act. There is no evidence that the affected employees' associations were involved prior to the coming into effect of this Act. This therefore gives credence to the finding by this Court that the termination of Don Bosco Ginindza and his 73 colleagues was by the employer – the Swaziland Government – without fault on the part of the employees. (See in this regard the authority of the ***Samuel Zikalala v Jomar Investments (PTY) LTD t/a Shamrock Butchery IC Case No. 672/2006***)

15. The Court in the ***Magdelene Thring*** matter made it succinctly clear that that an analytic consideration of section 34 (1) of the Employment Act makes it clear that the fault of the employer or the employee is a major factor for

consideration. We fully share the same sentiment. In this present matter this means that since it is the employer that decided that it wanted to abolish the Directorate of Civil Aviation and in its stead establish the Civil Aviation Authority. Obviously this cannot be imputed on the affected employees. This was all done by the Swaziland Government to the exclusion of the employees until the latter stage when their associations were then engaged for the purposes of their transition to this new unit.

16. Having said this, the Court therefore points out that the line of argument by Ms Nkhambule, on behalf of the Respondents, that the termination of the Applicants was due to redundancy in terms of section 40 of the Employment Act, 1980 is without merit. It is nothing more than a flimsy attempt by Counsel to clutch at straws. In this regard the Court refers to the letter of the Chairman of the Civil Service Commission at page 24 of the book of pleadings. This letter states in bold black and white that the reason for the termination of the Applicants' services was as a result of the abolishment of their positions, not redundancy as was now alleged by Counsel. The ninth edition of the Concise Oxford Dictionary of Current English defines redundant as '(of a person) no longer needed at work and therefore unemployed.' That cannot be said of the Applicants before us. They were

still needed hence the reason for their transition to this new unit, the Civil Aviation Authority. It is therefore a finding of this Court that the Applicants are entitled to be paid their severance allowance in terms of section 34 of the Employment Act. And in paying this severance allowance, regard should be had to the relevant section in the Employment Act, 1980, as amended, especially section 34(3), which entitles the employer to repayment (from that particular fund) equal to its (employer's) total contribution to the pension fund.

17. Then there is the claim in respect of the unutilised leave. On this issue the Applicants, per the founding affidavit of Don Bosco Ginindza, only state that at the time of the termination of their services the Swaziland Government was obliged to pay them in lieu of their outstanding leave days. There is then an annexure 'A' attached to this founding affidavit which contains the computation of the number of outstanding leave days and the amount owed for same for the affected employees. The outstanding leave days range from 1 day to 79 days.

18. Leave is one of the many aspects of the employment relationship between the Swaziland Government and its employees that is regulated by the General Orders. In terms of General Order A.306 headed '**APPROVED VACATION LEAVE SHALL BE UTILISED**', an officer who has proceeded on vacation leave shall be required to take all the leave granted to him, unless he is recalled to duty by his Head of Department before the expiration of that leave. General Order A.306 further provides that if an officer of his own volition curtails his leave, such curtailment may entail its forfeiture.
19. Then there is also General Order A.309 with the heading '**VACATION LEAVE: WHEN IT SHALL BE UTILISED**'. It provides under sub order (1) that subject to the exigencies of the Service, and to the terms of General Orders A.309(2) , or A.310 as appropriate, an officer shall be required to take all the vacation leave earned within a leave year before he begins a new leave year. But should an officer be unable to utilise all his earned vacation leave days then General Order A.309(2) comes into play. It provides that in extreme individual cases where an officer has not been able to utilise his leave days due to the exigencies of the Service then his Head of Department

shall extend his leave taking period to 30 June of the succeeding year. If this request for the taking of the unutilised leave days is approved, the affected officer has to take the balance of the outstanding leave days within three months of the beginning of the new leave year. In this respect, his Head of Department shall make the application for the extension to the Principal Secretary Ministry of Public Service. General Order A.309(4) states that if an officer of his own volition chooses not to enjoy all the vacation leave earned within a leave year, he shall forfeit it. In terms of General Order A.310 an officer appointed on after 1st July in any leave year shall be permitted to carry over any leave outstanding until the 30th June of the succeeding year. And if not used by that date the leave shall be forfeited.

20. What is to be noted in the General Orders quoted above is the consistent use of the peremptory word 'shall'. And it is the finding of this Court that such consistent use of the word '*shall*' in the General Orders signifies that what they seek to regulate is generally imperative and/or mandatory. This, in effect, means that it is peremptory that civil servants take all their vacation leave earned within a leave year and before the dawn of a new leave year. Where however, a civil servant has not been able to so utilise his leave days,

in *extreme* individual cases, or rare cases, such civil servant shall have his/her leave extended by the relevant Head of Department, following a request by that affected employee. In this matter before us, and as rightfully pointed out by the Respondents' Counsel and conceded by Mr. Lukhele, the Applicants have not explained reasons for the non-utilisation of their leave days. As pointed out at paragraph 17 above, some of the outstanding leave days for some of the employees amount to dozens and dozens of days. The Court asks itself why the accrued leave dating back to a number of years was not utilised. The Employment Act 1980 allows for the deferment of earned leave but such has to be agreed on by the Employer in writing, which is not the case in *casu* (see section 122(4)). It is therefore a finding of this Court that the Applicants have failed to make out a case for this Court to intervene in their favour in relation to the leave claims.

21. Taking into account all the circumstances of this case, coupled with all the evidence and submissions of Counsel, the Court accordingly makes the following orders;

a) It is hereby ordered that the Applicants herein are entitled to be paid

their severance allowance in terms of provisions of the Employment Act, 1980, as amended. In this regard the parties are to meet and compute the calculation thereof within 14 days from the date of delivery of this judgement.

b) The claims of the Applicants in respect of unutilised leave be and are hereby dismissed.

c) The Respondents are also ordered and directed to pay the Applicants costs of suit.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 26th DAY OF MAY 2015.

For the Applicant : Attorney A. Lukhele (Dunseith Attorneys).

For the Respondent : Attorney N. Nkhambule (Attorney General's Chambers).