

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 334/17

In the matter between:

BONGINKOSI TSELA & 72 OTHERS

1st Applicant

SWAZILAND HEALTH INSTITUTIONS AND

ALLIED WORKERS UNION (SHIAWU)

2nd Applicant

and

**SOUTHERN AFRICA NAZARENE UNIVERSITY
(SANU)**

Respondent

Neutral citation: *Bonginkosi Tsela & 72 Others v Southern Africa Nazarene University (334/17) [2018] SZIC 58 (June 28, 2018)*

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and S. Mvubu
Nominated Members of the Court)

Heard submissions: 07/06/18

Delivered judgement: 28/06/18

SUMMARY---Labour Law---Respondent employer effecting 7% deduction from salaries of its employees and contributing an equivalent amount with the intention to establish a pension fund---Respondent investing the contributions with African Alliance pending the establishment of the pension fund---Respondent delaying and/or failing to establish the pension fund---Employees demanding to be refunded the monies deducted from their salaries together with interest---Employer refunding the employees together with interest---Employees now demanding the employer’s contribution.

Held---The Applicants having failed to produce evidence of any rules or terms and conditions regulating the investment of the monies with African Alliance, no legal basis for the demand of the employer’s contribution was established entitling the Court to grant the order sought. Applicant’s application accordingly dismissed.

JUDGEMENT

INTRODUCTION

1. The Applicants instituted this application before the Court on Notice of Motion against the Respondent and are seeking the following orders;

“1.1 Declaring the unauthorized deductions from the salaries of the Further Applicants as unlawful.

- 1.2 *Directing and/or ordering the return to First Applicant all the funds and/or contributions together with interest and other proceeds earned from such contributions.*
 - 1.3 *Directing and/or ordering the Respondent to engage the Second Applicant on the setting-up, introduction and implementation of a retirement and/or pension scheme benefit for the First Applicant.*
 2. *Costs of this application to be awarded against the Respondent.*
 3. *Granting further and/or alternative relief as the Court may deem appropriate.”*
2. The application first appeared before the Court on 24th October 2017. The Respondent filed its Notice to oppose the application but did not file any answering affidavit.
 3. The Respondent’s attorney told the Court that they did not file an answering affidavit because the Respondent intended to have the matter settled out of Court. The Respondent’s attorney advised the Court further that the Respondent was of the view that the matter could easily be settled by mutual agreement, but not necessarily in terms of the prayers set out in the Notice of Motion.
 4. The parties therefore agreed to have the matter postponed until 10th November 2017 to allow the negotiation process to be finalized and

come back to Court on that day to register a Memorandum of Agreement.

5. Indeed, on 10th November 2017, when the matter appeared before the Court the parties told the Court that they had reached an agreement. They had not reduced the agreement into writing. They told the Court that they agreed to amicably resolve the matter on the following terms;

- “1. *Deductions from employees shall be halted with immediate effect.*

2. *Respondent to return to its employees the funds and/or contributions paid to African Alliance together with interest and other proceeds from such contributions on or before 30th December 2017.*

3. *Each party to pay its own costs.”*

6. The agreement was accordingly made an order of the Court with the consent of the parties. The Applicants have now filed the current application on Notice of Motion and are arguing that the Respondent is in contempt of the Court Order. The Respondent filed its answering affidavit in opposition thereto. The Applicants thereafter filed their replying affidavit.

FACTUAL BACKGROUND

7. The background facts to this application are as follows; the Respondent at the end of September 2013 began to effect deductions from the salaries of its employees, the 1st Applicants. The Respondent explained to its employees that the intention was to establish a pension fund. The Respondent was deducting an amount equivalent to 7% of the basic salary of the employees. The Respondent was also contributing a similar amount.
8. The monies deducted from the employees and the employer's contribution was invested with African Alliance pending the establishment of the pension fund and the interest earned accrued to the employees.
9. The Respondent however failed to establish the pension fund. The employees sought the intervention of the Ombudsman for Financial Services. The Respondent explained to the Ombudsman by letter dated 04th August 2016, (**Annexure AA4**), that its intention was to establish a Retirement Fund Scheme and a Group Life Assurance Scheme for its staff members.
10. It is not in dispute that the pension fund was not established hence the Applicants ran to Court to have the deductions from their salaries halted and to be refunded their contributions together with interest thereon.

11. The Respondent has since complied with the consent order and returned to the employees their contributions together with interest. The Applicants are of the view that the Respondent should also pay to them the Respondent's contribution. The Respondent is resisting this demand by the Applicants.

ISSUE FOR DETERMINATION

12. The main issue for determination is whether or not the Applicants are entitled to demand the employer's contribution. During argument before the Court, the Applicants failed to produce in Court the rules or terms of the investment with African Alliance. The Applicants therefore failed to establish a legal basis for the claim of the employer's contribution. It was not in dispute that the pension fund was never established. A pension fund once established is governed by rules agreed to by the parties which determine or regulate the rights and obligations of the parties. In *casu*, there were no such rules and regulations as the pension fund was never established.
13. From the evidence before the Court, the employees have always been clear that since the employer had failed to establish the pension fund, they were entitled to be re-imbursed the amounts deducted from their salaries as the purpose for the deductions was not being achieved. The employees in their resolution to institute legal proceedings, **Annexure "R5"** of the founding affidavit of the main application, the employees resolved as per paragraph 1 that:

- “1. *Legal action must be taken as soon as possible to stop the unauthorized and unlawful deductions and to recover remuneration that has been deducted.*”
14. Again, as early as 2016, the employees have always been aware that if the establishment of the pension fund fails, they would be entitled to a refund. The employees Union (2nd Respondent) wrote a letter of demand to the Respondent dated 05th October 2016, **Annexure “AA2”** wherein it stated in paragraph 5 and 6 that;
- “5. *We herein advise yourself to stop the unlawful deductions with immediate effect and pay back all such monies so deducted from our members with all interest accrued at 9% per annum failing which we shall institute legal action against yourselves without any further notice thereto.*
6. *You are advised to comply with such demand within 7 days hereof.*”
15. The demand by the Union was clear, it was for the Respondent to “*pay back all such monies so deducted from our members.*” It is therefore not clear to the Court, in the absence of any instrument or undertaking by the Respondent as to what is the legal basis for the demand of monies that were never deducted from them. The consent order itself is also very clear and unambiguous that the Respondent is to *return* to its employees the funds and/or contributions. To return simply means to send back to the person or place where something

originally belonged or was obtained. **(See: The Concise Oxford Dictionary of Current English, 9th edition, page 1178).** The employer's contribution never belonged to nor was it obtained or taken from the employees.

16. The only legal basis to claim the employer's contribution could be in terms of the rules of the pension fund if it were established and the rules so provided. In casu, there were no rules of the pension fund referred to. The evidence revealed that the pension fund was never established.

17. The rationale for the deductions from their salaries was perfectly known by the Applicants. In paragraph 7.11 of the founding affidavit of the main application the deponent Bonginkhosi Tsela averred that;

“7.11 The deductions were affected pending the establishment of a proper Retirement Fund...”

In paragraph 8.2 the deponent further stated that;

“8.2 The Respondent has failed and/or neglected to establish a proper pension fund scheme as promised, which complies with the dictates of the law governing pensions or retirement funds.”

18. The evidence was clear that the intention was to establish a retirement or pension fund. The Respondent failed to achieve that goal. The employees on their own decided to withdraw from the exercise and

demanded a refund. The Respondent had no problem paying the refund together with the interest earned whilst the money was invested with African Alliance pending the setting up of the pension fund.

19. The plan to establish the pension scheme having not been achieved, clearly each party was entitled to be refunded its contributions. The Applicants have failed to establish a legal basis for the claim to be paid the contribution made by the other party. The contributions by the parties were never remitted to any pension fund as the Applicants withdrew from the arrangement before the pension fund was established.

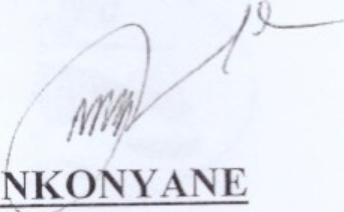
CONCLUSION

20. The Applicants failed to produce before the Court any rules and/ or terms and conditions regulating the investment of the monies with African Alliance Investment Managers pending the establishment of the pension fund.
21. In the circumstances of this case, the Applicants having failed to establish a legal basis for their claim, the application ought to be dismissed. The Court will accordingly make the following order;

a) The Applicants' application is dismissed.

b) There is no order as to costs.

22. The members agree.



N.NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicants : *Mr. A. Fakudze*
(Labour Law Consultant)

For Respondent: *Mr. F. Tengbeh*
(S.V. Mdladla Attorneys)