



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No.379/19

In the matter between:

HEZEKIEL DUBE

Applicant

And

THE CIVIL SERVICE

1st Respondent

COMMISSION THE

2nd Respondent

GOVERNMENT OF ESWATINI

3rd Respondent

THE ATTORNEY GENERAL

Neutral Citation: Hezekiel Dube vs. The Civil Service Commission and 2 Others
(379/2019) [2022] SZIC 44 (21 April 2022)

Coram:

V.Z. DLAMINI- ACTING JUDGE

*(Sitting with D, Mmango and MT E Mtetwa - Nominated
Members of the Court)*

LAST HEARD: 28th March 2022

DATE DELIVERED: 21st April 2022

SUMMARY: *Applicant instituted an application against the Respondents seeking payment of an amount in lieu of seventy-eight (78) leave days which were due to him at the time of retirement . Applicant further seeks payment of pension benefits for a period prior to admission to pensionable service.*

HELD: *As Applicant had failed to join the Public Service Pension Fund which has a peculiar and substantial interest, claim for pension benefits cannot be determined until the Fund is joined.*

HELD: *On the claim for leave pay, Applicant partially succeeds due to Respondents' delay in processing application for leave a time when he was approaching retirement, but failed to adduce proof justifying accumulation of the balance of the outstanding leave.*

JUDGEMENT

INTRODUCTION

[1] The Applicant is a retired public officer of LaMgabhi area in the Manzini region. He was admitted by the 1st Respondent to the pensionable establishment on the 1st April 1983 and confirmed to permanent employment on the 1st April 1985 and subsequently retired on the 7th June 2017.

[2] On the 11th December 2019, the Applicant filed an application against the Respondents claiming payment of an undisclosed amount in lieu of seventy eight (78) leave days due to him at the time of retirement. Furthermore, the Applicant claims pension benefits due from the 17th

August 1980 to 3_{pt}

March 1983, a period before he was admitted to pensionable service. The Respondents opposed the application.

APPLICANT'S CASE

[3] The Applicant alleged that between 2008 and March 2017 he was deployed in Foreign Service as First Secretary to the Embassy of the Kingdom of Eswatini in Taiwan. During that period, he accumulated a total of one hundred and nineteen (119) leave days and only used forty-one (41) and had a balance of seventy-eight¹¹ (78) days when he retired, which he now claims.

[4] According to the Applicant, he could not utilize all his leave days because of the exigencies of the service in particular that the Embassy office was understaffed. Regarding the claim for pension benefits, the Applicant contends that in a Memorandum dated the 8th June 1990 from the Principal Secretary, Ministry of Labour and Public Service to the Principal Secretary, Ministry of Tinkhundla the former approved the his retroactive admission to pensionable service from 17th August 1980 to 31st March 1983. However, the Respondents never implemented the recommendation until the Applicant retired.

RESPONDENT'S CASE

[5] The Respondents raised a point in *limine* with respect to the claim for pension benefits. They submitted that the Public Service Pension Fund,

which

administered the pension benefits for public officers, was not joined in the application yet an order for payment of pension was being sought. On the merits of this claim the Respondents argued that only the 1st Respondent was vested with the authority to appoint and/or admit a public officer to pensionable establishment and in the Applicant's case she did so on the pt April 1985 having employed him on the 1st April 1983.

- [6] Regarding the leave pay claim, the Respondent submitted that in terms of the General Orders, the Applicant was supposed to utilize his leave days during each leave year failing which the leave was forfeited. In the event the Applicant could not take his leave days due to exigencies of the service, he could only be entitled to leave days if the Head of Department had refused permission, in writing, for him to proceed on leave.

ANALYSIS

- [7] During argument Mr. Dlamini submitted that the Public Service Pension Fund was served with the application at a later stage; this was disputed by Mr. Simelane. The Court enquired from Mr. Dlamini if the service of the Court process defeated the point *in limine* in the absence of a proper joinder of the Fund, he answered in the affirmative.
- [8] There is nothing on the application to show that the Public Service Pension Fund was served. The Court does not take cognizance of the Notice of Reinstatement and Filing Certificate of the Book of Pleading wherein the Applicant cites the Fund. Even then there is no return or affidavit of service

in terms of **Rule 6 (3)** of the Court to prove that the Fund received those notices albeit belatedly.

[9] In the case of **Swaziland Polypack (Pty) Ltd v Swaziland Government & Another (44/2011) [2012] SZSC 30 (31 May 2012)**, the Supreme Court said the following at paragraph 22:

"At page 659 His Lordship Fagan AJA stated the following-Indeed it seems clear to me that the court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interest. There may also, of course, be cases in which the Court can be satisfied with the third party's waiver of his right to be joined, e.g. if the Court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment. It must be borne in mind, however, that even on the allegation that a party has waived his rights that party is entitled to be heard, for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them or both. "

[10] Then at paragraph 25 of **Swaziland Polypack (Pty) Ltd v Swaziland Government (supra)**, the Court stated as follows:

"His Lordship Grosskopf J.A. in the case of Klep Values (Pty) Ltd v Saunders Valve (Pty) Ltd 1987 (2) SA 1 (AD) at 39 stated the following Of course, the desire of the parties cannot be conclusive in this matter. As pointed out in Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 649, the fact that the two parties before court desire the case to proceed in the absence of a third party cannot relieve the court from inquiring into the question whether the order it is asked to make may affect the third party. "

[11] Pension benefits in the public service are administered by the Public Service Pension Fund; which is established in terms of the **Public Service Pension Order 13/1993**. The payment of pension benefits by the Fund is regulated by **Order 13/1993**, as such, the Fund has a right to decide whether the Applicant's claim complies with the requirements of the Order; in the event the claim does not, the Fund is entitled to oppose it. We find that the Fund has a substantial and peculiar interest and would be prejudiced by an adverse order.

[12] It is trite law that the fact that a necessary party has not been joined does not result in the dismissal of the matter, but to a deferment until such time that the third party is joined. See: **Swaziland Polypack (Pty) Ltd v Swaziland Government (supra) at paragraph 25**. That however is not the end of matter because the claim for leave is self-standing and requires determination by the Court.

[13] **Section 120 (1)** of the **Employment Act, 1980** provides that notwithstanding any other law, an employer is obliged to give every employee paid annual holidays. The **Employment Act** applies to employees in the public service except in the case of disciplined forces. Accordingly, where there is a conflict the **Employment Act** supersedes the Government General Orders.

[14] **General Order A.301** reads as follows:

"The leave year shall begin on the 1st April and shall end on the 31st March each year, during which time an officer shall earn vacation at the rates set out in General Order A.320 or A.321 (2) as appropriate. This period shall include periods of authorized official duty spent in other countries. But other absence shall be conditioned by the terms of General Order A.323."

[15] **General Order A. 304** provides that the Head of Department may require an officer to take the whole or part of his/her earned leave vacation if the exigencies of the service requires. Then **General Order A. 309 (2)** states that where the Head of Department has not permitted the officer to take the full quota of leave vacation, the **HOD** shall extend the leave taking period to 1st June of the succeeding year. But if the officer does not take leave in the new leave year before the 31st March, it shall be forfeited.

[16] In terms of **General Order A. 376 (2)** an officer will not be paid in lieu of unused leave days where he or she fails to prove that his application for leave was refused in writing.

- [17] In the Court's view, there is no conflict between the above quoted General Orders and **Part XII** of the **Employment Act** (Annual leave provisions). During argument, Mr. Dlamini submitted that the Applicant had applied for leave, but it was refused on all those occasions, the Court drew his attention to the fact that the Applicant had omitted to annex those requests for leave to prove that they were refused due to exigencies of the service.
- [18] While Mr. Dlamini was still addressing the Court, Mr. Simelane displayed exceptional professionalism by handing over a request for leave from the Applicant dated 12th April 2016 (**Exhibit "HD 2"**) and a response from the Head of Department being the P.S Ministry of Foreign Affairs dated 18th October 2016 (**Exhibit "HD 3"**) and agreed that these be admitted as part of the evidence in the case.
- [19] The import of **Exhibit "HD 2"** and **Exhibit "HD 3"** above is that, firstly the Applicant was aware of the requirements of the General Orders pertaining to application for leave vacation. Secondly, there is no doubt that the Applicant used the same procedure to apply for leave on previous occasions. Consequently, he was aware that the exigency of service alone in the absence of a written refusal by the Head of Department was insufficient to succeed in a claim for unused leave days.
- [20] The Applicant insisted on filing his claim using motion proceedings despite the advantage presented by action proceedings being that he would have demanded the discovery of all his leave requests from the Respondents, if any.

That said we find that the Respondent delayed in responding to the Applicant's request for leave vacation. Nonetheless it is unclear if at the time **Exhibit "HD 3"** reached the Embassy in Taiwan, the Applicant proceeded on leave.

[21] Whatever the case, the Respondent's delay may have disrupted the Applicant's plans especially because in July 2016, he was served with notice of retirement, which was with effect from 7th March 2017 to 7th June 2017. Mr. Simelane submitted that the Applicant should have used his notice period to exhaust his outstanding leave days. We referred Mr.. Simelane to the provisions of **Section 125 (2)** of the **Employment Act** which provide that no employer shall require an employee to take his annual leave during the period of notice of termination of employment by the employer.

[22] Even if we are wrong in our interpretation of **Section 125 (2)** -meaning of termination by employer -in light of the decision of the Industrial Court of Appeal in **Magdalene Violet Thring v Dunns Swaziland (08/2013) [2014] SZICA 02 (19th March 2014)**, we are not satisfied with the manner in which Applicant's request was handled by the Respondents from April 2016 to October 2016. Nonetheless, the Applicant cannot succeed to the whole claim.

[23] In the Court's view, an equitable award would be to grant half of the Applicant's claim to emphasize to both parties the need to follow reasonable procedures and to act timeously.

CONCLUSION

[24] For the above reasons, the Applicant partially succeeds in his leave claim. The Court declines to determine the claim for pension benefits as a necessary party was not joined.

[25] In the result, the Court orders as follows:

- [a] **The Respondents are ordered to pay the Applicant an amount equivalent to thirty-nine (39) leave days.**
- [b] **The Applicant is granted leave to join the Public Service Pension Fund. The costs for joinder are reserved.**
- [c] **The determination of the Applicant's claim for pension benefits is deferred to a date to be determined by the Registrar after compliance with order [b] above.**
- [d] **Each party to pay its own costs.**

The Members agree.

V.Z. DLAMINI

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT: Mr. N. Dlamini
(Makhosi C. Vilakati Attorneys)

FOR RESPONDENTS: Mr. M. Simelane
(Attorney General's Chambers)