

**IN THE INDUSTRIAL COURT OF APPEAL (SWAZILAND)**

**CIVIL CASE NO.13/04**

**In the matter between:**

**SMALL ENTERPRISES DEVELOPMENT CO.**

**APPELLANT**

**AND**

**PHYLLIS P. NTSHALINTSHALI**

**RESPONDENT**

**CORAM**

**ANNANDALE JP**

**MATSEBULA J**

**MAPHALALA J**

**FOR THE APPELLANT: MR. HLOPHE**

**FOR THE RESPONDENT: M/S MULELA**

**JUDGMENT**

**JUNE 2006**

1. Appellant conducted a restructuring exercise as a result of which terminated the respondent's services and paid the respondent an amount of E60,195.00 as severance allowance.

2. There was in place a Pension Fund operated by the appellant for the benefit of its employees of whom respondent was one. The pension fund was known as the **"SEDCO MIDAS PENSION PLAN"**. The Pension Fund operated under certain rules annexed to appellant's heads of argument and marked "XL".

3. In terms of the rules of the Pension Fund i.e. Rule 8(f) the employees of the respondent were entitled to a gratuity which consisted of the employer's contribution (see Rule 8(a) dealing with contributions). This, an employee would be paid in the month in which he dies, withdraws or retires (see Rule (9) of annexure "X1").

4. An application was launched by applicant Phyllis P. Ntshalintshali in the *court aquo* requesting that the court orders the respondent to pay a sum of E158,151.88 as amount applicant was entitled to after respondent had terminated applicant's services on the ground of redundancy and which amount it was withholding from applicant.

4.1. Applicant admitted that she had been paid by respondent an amount of E60,195.00 as severance allowance in terms of Section 34 of the Employment Act 5/1980.

5. Respondent on the contrary resisted the claim by applicant on the basis that in terms of Section 34 of the Employment Act it was entitled to the repayment of the Employer's contribution to the Pension Fund which was equivalent to the severance pay it had paid to the employees (the applicant) in the sum mentioned above.

6. The Fund mentioned under paragraph 2 above had in the meantime paid the appellant E59,393.39 for onward transmission to the respondent. This amount was paid to respondent and the respondent was dissatisfied with this payment and was

demanding an amount of E158,151.89 from the appellant.

6.1. The amount of E158,151.88 was apparently amount due to her on account of appellant termination of her services with it.

6.2. Whereas the payment of the E60,195.00 being severance allowance was paid to respondent by appellant in terms of Section 34 (3) of the Employment Act 1980.

6.3. Appellant is appealing against the decision of the *court a quo* ordering it to pay back respondent the sum of E60,195.00.

7. Reading the rules i.e. Rules of the "**SEDCO MIDAS PENSION SCHEME**" Rule 25.

7.1. Rule 25 reads "if member's service is terminated before normal retirement date because he is retrenched or becomes redundant ....he shall receive in addition to any benefits due to him under Rule 25 (2) the balance (if any) of his member's share (*emphasis mine*).

7.2. I find a very striking similarity in the Swaziland Court of Appeal of the Trustees of Swaziland Railway Gratuity Scheme and Swaziland Transport and Allied Workers Union - **APPEAL CASE NO.1442/93**.

7.3. In that case, it was also held that payment of a gratuity was based on a contract between the employee and the Pension Fund Scheme. On the other hand payment of the severance allowance was a statutory obligation imposed by the provisions of Section 34 of the Employment Act on the part of the employer.

7.4. The Appeal Court in rejecting the case for a set-off stated as follows:-

7.4.1. Mr. Kades submitted to us that since the appellant (Pension Scheme) has to pay a gratuity in terms of the Rules of the Scheme and also has to refund the contribution made to the Fund by the employer this amounts to a double allowance to the employee. In my

view there is no substance in this submission. It ignores, as was argued by Mr. Flynn before us on behalf of the respondent (Union), the distinction between the employees contractual right to the gratuity in terms of Rule 8(f) and his statutory right to severance allowance in terms of the Act."

7.4.2. The learned Judge President in the present case following *ratio decidendi* in the Railway case supra found that the respondent should recover any severance allowance paid from the Pension Fund and not from its employee the applicant.

8. It was on that basis that the *court a quo* ordered a refund to the respondent the sum of E60,195.00 withheld by the respondent.

It is my considered view that the appeal should be dismissed. And I so order.

8.1. Even though this court can order that costs of this appeal be for the successful party, I am of the view that in the particular circumstances of this case there should be no order as to costs.

**J.M. MATSEBULA**  
Appeal Judge

**I AGREE**

**J.P. ANNANDALE**  
Judge President

**I AGREE**

**S.B. MAPHALALA**  
Appeal Judge