



IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

Held at Mbabane

Case NO.08/2013

In the matter between:

MAGDALENE VIOLET THRING

Appellant

and

DUNNS SWAZILAND

Respondent

Neutral Citation: *Magdalene Violet Thring and Dunns Swaziland
(08/2013) [2014] SZICA 02 (19th March 2014)*

Coram: Ramodibedi JP

Mamba AJA

Hlophe AJA

Heard: 12/03/2014

Judgment Delivered: 19/03/2014

Summary

Labour law – Severance allowance – When is it payable to an employee – Interpretation of section 34 (1) of the Employment Act of 1980 as amended – What is Severance allowance – Severance allowance payable to an employee whose services were terminated by an employer – When services are terminated by an employer – Interpretation of Section 36 (k) of the Employment Act of 1980 - In the case of retirement, services not terminated by an employer – In such a case services terminated by agreement or automatically or out of effluxion of time – Since services not terminated by employer, Severance allowance not payable – Appeal dismissed. In view of the current practice application cannot be viewed as an abuse of the court process - Accordingly each party to bear its own costs.

JUDGMENT

The Court

[1] The appellant instituted application proceedings in the court a quo where she sought an order inter alia declaring that the Respondent was in breach of Section 34 (1) of the Employment Act No. 5 of 1980 as well as an order directing that the Respondent pays her a severance allowance amounting in all to a sum of E286, 800.00 (Two Hundred and Eight Six Thousand

Eight Hundred Emalangeni). She also sought an order granting her the costs of the application.

[2] In her said application the Appellant as Applicant contended that she had worked for the Respondent for a period of 26 years in all and was a Regional Sales Manager as at the time she retired; she having been employed on 18 November 1986 and retired on 28 February 2012.

[3] It is not in dispute that when she retired or stopped working the Appellant was 70 years old. Although she said the retirement age in terms of her terms and conditions of service was unknown to her, it allegedly never having been disclosed to her, the Respondent contended on the other hand that the retirement age was initially 65 years which was later reduced to 63 years in 2011. In the Appellant's case, and given that she was meant to retire in 2006, she was supposed to retire at 65 years of age, were it not for her alleged request that she be allowed to continue in her job beyond that age, until 28 February 2012

when she allegedly asked and was allowed to retire after she had fallen ill.

[4] Whilst the Appellant contends that the termination of her services was due to retirement after she had reached 70 years of age, the Respondent contended that she had requested that her retirement age be extended from 65 years onwards. She remained in this position until the day she indicated she could not carry on working at 70 years after she had fallen ill. The Respondent was contending that due to this fact, the Appellant had resigned from her employment and was therefore not due any severance allowance according to the Employment Act.

[5] The court a quo came to the conclusion that the Appellant retired automatically upon reaching 65 years and that her engagement beyond the retirement age aforesaid was a new contract of employment between her and her employer, which was terminated by mutual consent when she reached the age of 70. Whilst dismissing the Respondent's contention that the

Appellant had not retired but had resigned at 70 years, the court a quo could however not agree that the fact that she retired (as stated above) entitled her to payment of Severance Allowance. In this regard the court held that Section 34 (1) of the Employment Act of 1980 as amended did not entitle the Appellant to the payment of Severance Allowance in as much as retirement was not a termination of services by the employer, something which the court found the Section required for an employee to be paid Severance Allowance. It concluded that the termination of services on retirement was a termination by agreement or out of effluxion of time or was automatic, none of which would in terms of Section 34 (1) entitle the Appellant to payment of Severance Allowance.

[6] It was as a result of Appellant's dissatisfaction with the said judgment or decision of the court a quo that she noted the current appeal against it.

[7] The thrust of the Appellant's appeal is that the court a quo failed to properly interpret Section 34 (1) of the Employment Act as amended and placed too much reliance on the words expressed in the Section which state that the termination of an employee's services must be "by his Employer" for him or her to qualify to be paid Severance Allowance. The Appellant contended further that the approach by the court a quo did not pay much attention to the fact that retirement as a ground for termination of employment was outside paragraphs (a) to (j) of Section 36 of the Employment Act and was in that sense one of the grounds for termination of employment on the basis of which Severance allowance was payable according to Section 34 (1) of the Act. It was a further thrust of the Appellant's appeal that the court a quo had failed to give a purposive interpretation of Section 34 (1) particularly as regards when an employment can be said to have been terminated by the employer. According to the Appellant the court a quo should have found that a retirement was a termination of services by the employer as suggested by Section 36 (k) of the Employment Act of 1980.

[8] From the consideration of the papers filed of record, it is clear that the issue before this court is the proper meaning and effect of Section 34 (1) of the Employment Act of 1980 as amended, namely, the payment of Severance Allowance to retiring employees.

[9] Verbatim, Section 34 (1) of the Employment Act of 1980 as amended reads as follows:-

“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 a 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.”

[10] According to the Appellant, the court a quo erred and placed too much reliance on the words “by his employer” when considering the fact that the Section excludes paragraphs (k) and

(l) from those instances in which Severance allowance will not be payable if the termination is based upon them. In other words it was contended that the court a quo did not consider the exclusion of paragraphs (k) and (l) from those situations in which the termination of services does not lead to the payment of Severance Allowances. Retirement being covered under paragraph (k) of Section 36 of the Employment Act is the termination of services “other than under paragraph (a) – (j)” of Section 36 of the Employment Act, which, it was argued, means that the Appellant should have been paid Severance Allowance in accordance with the said Section.

[11] The Appellant contends further that the provisions of Section 34 (1) particularly as regards the phrase terminated “by his employer” should not be interpreted literally but that a purposive interpretation ought to be given to the said words. This he submits, is because when considering the provisions of Section 36 of the Employment Act of 1980 of which paragraphs (a) to (j) referred to in Section 34 (1) are a part of, retirement is

taken to be a termination of services of an employee by the Employer when considering what it expressly provides. A verbatim reading of Section 36 (k) of the Act provides as follows in this regard:-

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

(a)

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(k) because the employee has attained the age at which in the undertaking in which he was employed [it] is the normal retiring age for employees holding the position that he held”.

The argument was that the effect of this section, particularly its framing, was to indicate that retirement is a termination by the employer. If it were so, the argument went, Severance Allowance ought to be paid to such employees as their termination was not only outside paragraph (a) to (j) of the Act but was also by the employer.

[12] It was further contended that it would be unfair for this Court to conclude that an employee who has worked for one employer for 26 years would not be paid a Severance Allowance which is allegedly an allowance to compensate an employee or to recognize an employee for his long and faithful service to the employer. The termination of services on the basis of retirement was, it was argued; akin to the termination of services on the basis of redundancy or retrenchment which is covered in paragraph (l) of Section 36 of the Employment Act; and that like retirement it is expressly excluded from those grounds in which a termination would not attract the payment of Severance Allowance referred to as paragraphs (a) to (j) of Section 36 of the Employment Act.

[13] Expressing a contrary view in the papers and the Heads of Argument, the Respondent contended that there is no ambiguity in the Section calling for its interpretation or even that of the impugned words. The intention of the Legislature, it contended, is clearly that Severance Allowance is payable only in those

instances where the termination of an employee's services was at the instance of the employer, in other words where the employee was not at fault for the termination. Retirement, it was argued, was clearly not such a ground for termination as it was by agreement or by effluxion of time or was automatic.

[14] Furthermore, the Respondent contended, the purpose of Severance Allowance was to compensate an employee for losing his job through no fault of his as opposed to that of an employer. In fact the Respondent has likened retirement to resignation in its effect, submitting that as in the latter case, the termination of one's services under retirement was not a termination by the employer but a termination by agreement or effluxion of time. On this consideration alone, the Respondent submitted that the appeal ought to fail.

[15] Primarily, it was contended on behalf of the Respondent in the Heads of Argument that an interpretation of Section 34 (1) of the Employment Act of 1980, called for a consideration of two

fundamental requirements or elements namely the jurisdictional fact that the termination of the employee's services must be "by the employer" and that same must be for a ground other than that contemplated in paragraphs (a) to (j) of the Employment Act of 1980. These requirements, it was contended, had to coexist for one to be paid a Severance Allowance.

[16] During the hearing of the matter, Counsel for the Respondent Advocate Flynn somewhat changed his argument from what it was in terms of the Heads of Argument. He argued strenuously that in the context of Section 36 of the Employment Act, the retirement age as set out in the terms and conditions of the employee concerned was just a policy set by the employer which required his acting upon it for it to be activated. In this sense Severance Allowance would only be payable if the employer acted on such a policy. If the employer did not act on it, so his argument went, the employee would remain in employment despite having gone beyond the stipulated retirement age if the employee himself had not opted to

terminate his service which would then amount to a resignation. In fact the employee could remain in such employment ad infinitum without retiring if the employer does not terminate the services of the said employee or the employee decides to leave, which as stated above would amount to resignation. In the latter case no Severance Allowance would be payable to the employee concerned. In the case of the retirement being effected at the instance of employer, however, Severance Allowance would be payable at whatever stage the employer decides to terminate the employee's services after the latter has reached the retirement age.

[17] In line with this contention, it was argued by Advocate Flynn that in the present matter although the termination was after the retirement age, it was at the instance of the employee and not the employer. He submitted therefore that no Severance Allowance was payable to the employee, as she had resigned from her employment.

[18] We must state from the onset that we have difficulty accepting this line of argument. This is so firstly because it seeks to undermine one of the primary functions of the Employment Act, which is the protection of an employee's rights as it suggests that the terms and conditions of service agreed upon between the parties, or some aspects of them are not applicable until the employer approves them or allows them to be applicable. Further it seeks to change for the worst the meaning of a retirement as generally understood.

[19] It is indisputable in our view, that retirement is a way of bringing employment to an end. This is neither at the instance of the employer nor that of the employee but as a result of an agreement reached between the parties during the conclusion of the employment agreement which makes it a termination by agreement or by effluxion of time or automatic upon the arrival of the agreed date. According to the **Compact Oxford English Dictionary Third Edition, Revised, 2008:-**

“To retire is to leave one’s job and stop working especially because one has reached a particular age”.

In the same Dictionary, “retirement” is defined as

“The action of retiring or the period of one’s life after retiring from work”.

[20] It seems to this Court that there is an element of ambiguity in Section 36 (k) of the Act in so far as it suggests that retirement, which is an independent and automatic act that comes about when an employee reaches the agreed age in an undertaking, is termination by the employer. In its usual grammatical usage, retirement is not a termination by an employer but an automatic act which comes about when an employee reaches the agreed retirement age. 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, of which retirement is clearly not one.

[21] Having said the foregoing, it seems that a proper determination of this matter lies in the ascertainment of the purpose for the payment of Severance Allowance. It is obvious that depending on what one considers its purpose to be, different conclusions are bound to be reached. One school of thought considers the purpose for the payment of Severance Allowance to be an award for good, long and faithful service by an employee. The other school of thought considers it to be compensation for an employee whose services have been terminated by the employer through no fault of the employee.

[22] Indeed in her Heads of Argument per paragraph 18, the Appellant asserts what she considers to be the purpose of Severance Pay or Allowance in the following words:

“The clear intention of Section 34 (1) was to reward good conduct and faithful and long service. The judgment of the court a quo fails to take this into consideration. It is submitted that retirement is termination of services under Section 36 (k) of the Employment Act and is

therefore a termination other than under Section 36 (a) to (j) of the Employment Act as contemplated by Section 34 (1)”.

[23] The Respondent on the other hand states the following under paragraph 2.4 of its Heads of Argument as regards the purpose of Severance Allowance:-

“The purpose of Severance Pay is to provide limited social security to employees left stranded without employment through no fault of their own”.

[24] The proposition that Severance Allowance is arrived at as compensating an employee for long and faithful service only is not supported by any authority we have come across and the Appellant has referred us to none as well unlike in the other contention that it is a security for the termination of an employee’s services through no fault of his. This proposition is supported by among other authorities **Bronn vs University of Cape Town (1999) 20 ILJ 951 (CCMA)**. The following

apposite remarks were stated in that case, which dealt with a substantially similar legislation to our Act:-

“Where the need for the termination to be at the employer’s behest is emphasized, the whole thinking behind the LRA’s making severance pay a statutory right for the first time in South Africa is undoubtedly to provide limited social security to employees who are left stranded without employment and thus income, where an employer has dismissed them for operational requirements, through no fault of their own.”

[25] It is apparent though that whilst Severance Allowance could be aimed at rewarding an employee for good conduct coupled with long faithful service, it is still a peremptory statutory requirement imposed by Section 34 (1) of the Employment Act to determine at whose fault the termination of the said services came about. That is to say was the termination at the instance of the employer? Or put differently, was it the employer’s fault? This is where the purpose of Severance Allowance as suggested or as contended by the Appellant falls short in our view. This

we say because Section 34 (1) does not just talk of paying Severance Allowance upon termination but it qualifies such termination of services as having to be “by the employer” for Severance Allowance to be paid. This phrase and the exclusion from the obligation to pay Severance Allowance arising from instances in which termination was as a result of an employee’s fault, suggests that the said termination of an employee’s services must not have been as a result of the employees fault, but that of the employer for an employee to qualify to be paid Severance Allowance.

[26] Although dealing with a case of resignation by an employee which is not quite the same point in dispute in this matter, there is however similarity if anything by analogy and on the principle applicable, when considering that in such a setting the termination is not at the instance of the employer so much so that the amount of time spent in the undertaking does not matter if the services were not terminated by the employer. In **Samuel Zikalala v Jomar Investments (PTY) LTD t/a Shamrock**

Butchery, Industrial Court Case No. 672/2006; the court stated the following whilst stressing the importance of the termination of the services by the employer including the requirement of fault on his/her part before Severance Allowance could be said to be payable in terms of the Employment Act:-

“It must be presumed that Parliament enacted Section 34 (1) of the Employment Act after careful consideration of 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 the Legislative Policy”.

[27] We agree that the foregoing expresses the proper position of the law with regard to payment of Severance Allowance even in instances of retirement, that is to say according to Section 34 (1)

of the Act, it should happen in those instances where the termination of services is by the employer without fault on the part of the employee.

[28] This in our view is so even though at face value Section 34 (1) of the Employment Act, in so far as it concerns the exclusion of paragraphs (k) and (l), suggests that an employee whose services have been terminated on such grounds should be paid a Severance Allowance. We say this because an analytic consideration of the Section concerned makes it clear that the fault by the employer or the employee is a major factor for consideration. This means that the ground for the termination of services by the employer must co-exist with the ground bringing about the termination in terms of paragraphs (k) and (l) of Section 36. It shall be remembered that unlike Section 34 (1) of the Employment Act, Section 36 does not deal specifically with the payment of Severance Allowance as it only covers grounds for a fair termination of services by an employer. We have already found that in so far as Section 36 (k) of the Employment

Act suggests that retirement as a ground for the termination of services is a termination by the employer, it is ambiguous, thus calling for an interpretation by this Court.

[29] It may as well be that the termination of services by the employer need not be unfair as it would suffice even if it was for a fair one like in the case of redundancy or retrenchment of an employee where the termination would be shown to have been at the instance of the employer even though same may be found to have been fair. That is to say, what is underscored is that the fault should not be that of the employee. Of course the same thing cannot be said in the case of retirement which is a contractual issue as to when the services would be terminated. It follows in such a situation that there is no fault attributable to the employee.

[30] We have considered the judgment in **Monica Groening and Eight others vs Standard Bank Swaziland Limited Formerly Barclays Bank Swaziland Case No. 326/01** and are convinced

that the said case is distinguishable from the present one. The medical retirement referred to in that case seems to have been compulsory which means that there was fault on the part of the employer and therefore the termination was at its instance. The same thing cannot be said in the matter at hand where the termination of services was at best agreed upon or at worst automatic or by effluxion of time and therefore not attributable to the employer.

[31] In our view there is no ambiguity in the wording of Section 34 (1) of the employment Act calling for what was termed a purposive interpretation of Section 34 (1) of the Employment Act. Whilst we do not fault the extract and the principle enunciated therein per the judgment of **Standard Bank Swaziland v Busisiwe Motsa N.O. and 11 others, High Court Case No. 2401/2011**, as regards purposive interpretation and its value, we are of the firm view that the principle is not applicable in the matter at hand and the two cases are distinguishable from each other. We agree that proper meaning must be given to

those words where their literal meaning leads to absurdity but, we are convinced that this is not the case in this matter with regards to the provision of section 34 (1) of the Employment Act.

[32] If the legislative policy changes so as to require that employees who retire upon reaching the retirement age be paid Severance Allowance, it is incumbent upon the Legislature to state that in clear language. We have no doubt that the Legislature will look into the matter should it conclude that its intention as currently expressed in the Section concerned is not what it wants it to be on the basis of some social considerations it may have.

[33] For the foregoing reasons we have come to the conclusion that the Appellant's appeal cannot succeed and ought to be dismissed.

[34] In view of the point for determination in the matter being legal and it not having been determined previously or if it had been, it

having hitherto supported the position as expressed by the Appellant, we are of the view that this is a proper case where costs do not have to follow the event. Fairness dictates that each party bears its own costs.

[35] Accordingly we make the following order:

35.1 The Appellant's appeal be and is hereby dismissed.

35.2 Each party is to bear its own costs.

Delivered in open Court on this the 19th day of March 2014.

**M. M. RAMODIBEDI
JUDGE PRESIDENT**

**M. D. MAMBA
A. J. A.**

**N. J. HLOPHE
A. J. A.**

For the Appellant: Mr. M. M. Sibandze

For the Respondent: Advocate P. E. Flynn