IN THE HIGH COURT OF SWAZILAND

P.J. van Staden Plaintiff

vs

Swaziland United Bakeries Ltd Defendant

Civ. Case No. 1594/94

CORAM S.W. Sapire ACJ

For Plaintiff Mr. Dunseith

For Defendant Mr. Flynn

JUDGMENT

(13/06/97)

Plaintiff who was at one time an employee of the defendant claims payment from the Defendant of amounts which it is alleged were due to him in terms of an agreement concluded between the parties but unpaid. The agreement was to provide for the "severance package" payable to the Plaintiff as compensation for the termination of the Plaintiff's employment with the Defendant on the grounds of Plaintiff's redundancy. Following upon both a "rationalisation", undertaken by the defendant and the return to the company of a former employee for whom a place had to be found, someone had to be retrenched. Despite the defendant's sincere appreciation of the plaintiff's loyal and excellent service, to quote the defendant's own appraisal, it was on the Plaintiff that the axe fell.

The unpleasant task of officially conveying this disturbing news to the plaintiff, fell upon R.H. Fidler who was the "Human Resources Manager" employed by the group of companies known as the Premier Group. Premier is based in Johannesburg. It has a large market for its wheat products throughout Southern Africa, and through subsidiaries operates bakeries in divers places. The Defendant is one of these subsidiary companies, which operates bakeries in

a vanstaden .....

Swaziland. Fidler came to Mbabane on the 19th November, 1993 to perform the duty for which I gather he had little or no particular taste. He maintained in evidence that he did not have a mandate to conclude a final agreement with the Plaintiff as to the terms of the retrenchment package, and that the meeting with the Plaintiff was no more than the first steps in a retrenchment discussion process obligatory in terms of labour law. That an agreement was concluded on that day, in terms of which Plaintiffs entitlement on retrenchment was fixed, however, admits of no dispute.

The plaintiff alleged in his particulars of claim that an agreement was orally concluded. The defendant similarly so alleged in its plea. The material difference between the two versions is that Plaintiff alleges that the retrenchment package included a severance allowance based on Premier group's retrenchment policy plus {my own underlining) the statutory severance allowance payable in terms of the Swaziland Employment Laws. This, it was common cause was a reference to section 34 of the Employment act of 1980. Defendant alleged a contract concluded for all practical purposes in the same terms save only that the provision for the payment of a second and additional severance

allowance was omitted.

Defendant dealt with the second additional allowance in paragraph 6 of its plea. The defendant's answer to the plaintiff's allegation that the Defendant undertook to pay the second severance allowance is that at the time of the conclusion of the agreement the plaintiff drew the attention of Fidler to the provisions of Section 34 of the employment Act and represented to Fidler that in terms of the Act the "severance allowance" provided for in Section 34(1) of the Act was compulsorily payable by the defendant to the plaintiff in addition to any severance package payable in terms of the Defendant's own retrenchment policies. The defendant went on to allege.

"The said Fidler on 19th November, 1993, advised the plaintiff that the defendant would comply with any statutory obligation imposed upon it in terms of the laws of Swaziland"

The defendant's case on this aspect of the dispute is that Fidler did not on behalf of the Defendant agree to pay the second severance allowance, but undertook or promised to make payment only if it was obliged to do so.

The plaintiff testified himself, the Defendant called Fidler, as its main witness. The latter had by the time he came to give evidence for the Defendant also been retrenched. The Plaintiffs evidence was given in a convincing manner and he was little moved in cross examination. He accepted the one inherent improbability in his case, namely that in the absence of any obligation to do so there was no reason why the Plaintiff should have offered or agreed to pay a double severance allowance. He did however insist that it was in fact so agreed.

He is supported by two documents which emanated from the defendant written by Fidler himself. The first is exhibit B, a letter written by Fidler to the Plaintiff on his return to his base in Durban. The letter is dated 26th November, 1993 and was intended to record what transpired at the meeting on the 19th.

At this point I pause to indicate that I find that little turns on the conflicting

evidence as to the venue of the meeting and as to whether White, the local manager and the Plaintiffs superior was present at the meeting or not. Witnesses were called by both sides on the question as to whether the Defendant had at the relevant time given up its offices at Mbabane House where Fidler says the meeting took place. Plaintiff is adamant that it took place at the bakery premises. On the probabilities and the weight of evidence the Plaintiff is correct, but as I say little turns on this.

The defendant's letter of the 26th November to which I have referred is seriously damaging to the case it seeks to put up. In it the following passage appears.

"It was agreed that you would take up the third option, the general principles of which are as follows:

1.1.....

1.2. A severance package based upon Premier Group's retrenchment policies of two weeks for each completed year of service, plus any severance monies promulgated under the Swaziland Labour Relations Act.

An exact calculation will be made in due course, to show you the value of this severance pay."

Fidler then went on in the letter to recite the further terms which had been agreed upon. These are the items which are in terms of the pleadings and the evidence common cause. Much significance is to be found in the words "agreed" and "plus" appearing in the passage quoted. It is not possible to accept what Fidler says he meant by the use of the words quoted. The words cannot be read to mean that the severance allowance provided for in the legislation was only to be paid if on investigation the Defendant was advised it was obliged to make payment thereof in addition to the amount calculated in accordance with the Premier Group's policy. The plain meaning of the English words does not allow for this interpretation. The formula was agreed upon. Only the amount as calculated in accordance therewith remained to be calculated.

Exhibit C is equally damaging to Defendant's case. This document is a memorandum faxed by Fidler to Plaintiff during the first half of December 1993. Fidler testified that by the time the memorandum was compiled, discussed with the plaintiff and transmitted, he had already been informed by the Defendant's legal department that only one severance allowance was payable.
The memorandum is a demonstration to the Plaintiff of the amount of money the Plaintiff would be paid in terms of the agreement concluded on 19th November. In his original calculation Fidler did not include an amount representing the severance pay calculated in terms of the Swaziland legislation.

He says that when he discussed the calculations with the Plaintiff telephonically the Plaintiff queried this. Although he maintains that he then told Plaintiff that he was not entitled to the amount he nevertheless amended the calculations to include the amount and added it to the amount he had originally shown as the total. He admitted that he struck out the original total and substituted for it a total which included the now disputed amount. Fidler maintained that he calculated the amount of the allowances because Plaintiff asked him to do so. This is difficult to accept for why should he calculate an amount to which he maintained the plaintiff was not entitled. He was not able to offer any explanation for including the amount so

calculated in the total which the Plaintiff could expect to receive.

Fidler was not an impressive witness. He appeared to be uncomfortable in having to support the case of his former employers. Although he denies he was "rapped over the knuckles" for agreeing on behalf of Defendant to pay a retrenchment package far more handsome than his superiors in the Premier Group thought appropriate, or wished to pay, his evidence suggests that they were far from pleased with the contract he brought home. Fidler delivered the fanciful explanation contradicting the clear meaning of both documents which I have examined unconvincingly and with signs of discomfort.

This was especially so when he was unable to explain why he included the amount of R26 960.00 in the sum the Plaintiff could expect to receive. His version may well have been his explanation to his superiors with which he saddled himself, and obliged himself to maintain in this case.

I find that the defendant bound itself contractually to pay the severance allowance calculated in terms of section 34 of the Employment Act in addition to the allowance calculated in terms of the Premier Retrenchment policy. It may have been a foolish agreement. It may have been an agreement over generous to the Plaintiff. It may on the other hand have been prompted by some feeling on the part of Fidler, that Plaintiff was entitled to special benefits for having to give up his position in the Defendant to make way for the returning former Minister. It is not insignificant in this connection that in the course of the correspondence Fidler expressed his personal apology for the plaintiff having been misled. All this signifies little, for the evidence clearly establishes that such an agreement was indeed entered into.

The second portion of the plaintiff's claim arises from a dispute as to whether allowances regularly and periodically paid to the plaintiff in respect of business use of his privately owned car are to be included in his pay package for the purpose of calculating the amount of the severance pay to which the plaintiff is entitled. The Plaintiff bases his argument for the inclusion of these amounts on the definition of "wages" found in section 2 of the Employment Act. The definition reads as follows:-

"Wages" means remuneration or earnings including allowances, however designated or calculated, capable of being expressed in money and fixed by mutual agreement or by law which are payable by an employer to an employee for work done or to be done under a contract of employment for services rendered or to be rendered under such contract"

The question must be answered against the Plaintiff as on his evidence the allowances were paid not for work done by him but for and as compensation for the use of the employee's privately owned motor car by the employee for the purposes of the employer's business.

His claim (a) will be allowed only to the extent of E26 960.00 which represents the amount of the additional statutory allowance which the defendant agreed to pay so calculated by the defendant in accordance with its correct interpretation of the daily rate. Claim (b) must fail.

There will be judgment for plaintiff for: -

a) payment of the sum of E26 960.00 together with
b) interest thereon calculated at 9% per annum from 1st March 1994 to date of payment and;
c) Costs of the suit

S. W. SAPIRE,

ACTING CHIEF JUSTICE