

IN THE HIGH COURT OF SWAZILAND

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Swaziland Transport & Allied Workers Union

vs

Swaziland Railway

Case No. 1424/1993

Coram S.W. Sapire

Judgment

(23/7/97)

This application has been pending since November 1995 and as yet is a long way from final determination. The matter came before me in terms of an order of Court of the 12th May 1995 in which it was directed that the matter be postponed to a date to be fixed by the Registrar for legal argument on the issue of the liability of the respondent to pay gratuity in terms of Rule 8(f) of the Rules of the Swaziland Gratuity Scheme to certain other members of the applicant. The order went on to provide that the determination of the amount payable if any to members of the applicant or any of them should stand over pending determination of the issue referred to in (a) above. In accordance with this order of Court the matter was heard by me.

The respondent initially wished to raise issues other than those referred to in the order of Court, namely the question of the locus standi of the applicant. It is further wished to raise the question

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of the non-joinder of the Swaziland Railway which it was said was a necessary party to the application.

As the order of court requiring argument on this particular issue was made with the consent of the respondent or at least in the absence of any opposition from it I did not entertain any argument on these points in limine. They are still available to the respondent when the matter is finally heard. I turn now to the issue on which argument was to have been addressed to me namely whether in terms of the provisions of the Swaziland Railway Gratuity Scheme the members of the applicant who were retrenched were entitled to the gratuity provided for.

The regulation 8 of the Rules governing the gratuity scheme provide as follows:- "8. Payment of Gratuities.

The following shall be entitled to a gratuity calculated under rule 9 :- ", f a member who is discharged from the service on the grounds of redundancy"

On the plain words of the rule the members of the Swaziland Transport and Allied Workers Union were employed by the Swaziland Railway and in terms of the employment were members of the scheme, and who were retrenched as is common cause are entitled to the gratuity therein provided for. It does not seem to me that there is any basis for argument against this.

Mr. Smith however who appeared for the respondents advanced a somewhat ingenious argument that because the employees in question are in terms of Section 34 of the Employment Act entitled to a severance package including a gratuity and in terms of sub-section 3 and 4 the Railway is entitled to reclaim from the scheme which is the respondent, its contribution to the respondent in respect of the retrenched employees, Rule 8(f) does not apply.

The argument is that not only will the gratuity scheme which is the respondent have to pay out the gratuities in terms of rule 8(f) but it would also have to refund to the Railways all contributions made by it in respect of the employees in question.

Mr. Smith further argued that if the interpretation contended for by the applicant was accepted the retrenched workers would not only be paid the package provided for in the employment Act but would also receive the gratuity in terms of rule 8(f). Thus they would be paid twice

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This argument demonstrates no more than that the legislation was passed without reference to the contractual rights of the parties. The legislation does not provide that if any person is to receive a retrenchment package in terms of section 34 he will not be entitled to any contractual benefits payable by any scheme of which he is a member. Such a provision cannot be implied as Mr. Smith would have me do.

It must be borne in mind that the respondent is a separate entity from the Swaziland Railway. The respondent was founded by an agreement and by becoming members the railway employees contract for certain benefits to which they are entitled in terms of the rules.

There is nothing in Mr. Smith's argument which persuades me that the ordinary meaning of rule 8(f) does not apply. It is an unequivocal contractual obligation undertaken by the respondent which is unaffected by the provisions of section 34 of the Employment Act

For these reasons question raised is answered in favour of the applicant and I find that the respondent is obliged to pay a gratuity in terms of rule 8(f) of the rules of the Swaziland Gratuity Scheme to those members of the applicant who were retrenched. The costs of this hearing will be paid by the respondent.

S W Sapire

Acting Chief Justice