IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE	CASE NO. 104/2000
In the matter between:	
SWAZILAND TRANSPORT AND ALLIED	
WORKERS UNION	1st APPLICANT
NONHLANHLA MKHONTA	2nd APPLICANT
and	
SWAZILAND RAILWAY	RESPONDENT
CORAM:	
NDERINDUMA:	PRESIDENT
JOSIAH YENDE:	MEMBER
NICHOLAS MANANA:	MEMBER
FOR APPLICANT:	S.MOTSA
FOR RESPONDENT:	D. MADAU

JUDGEMENT

17/10/02

The 2nd Applicant claims housing allowance from the Respondent her employer as from the 1st February, 1991 todate.

According to the particulars of claim, the cause of action arose from an agreement entered into between the 2nd Applicant and the Respondent on the 1st February 1991 the terms of which were that she was to vacate the house previously allocated to her by the Respondent at Mpaka and in turn would be paid a housing allowance. She was to relocate to her homestead' at Matsapha, away from the work station.

The offer to surrender the house was contained in a letter dated the 1st February 1991 and is annexure "A" to the Application.

The letter states in extenso as follows:

"It has been brought to our attention that you would be prepared to vacate your Railway house at the Mpaka Railway Village inorder to be paid a housing allowance amounting to E225 per month in lieu thereof. It would be appreciated if you would kindly confirm the validity of that statement and also indicate the date on which you can be expected to vacate the house.

Your co-operation in that respect will be appreciated. Yours faithfully.

B. N. Fakudze Director (P& A)"

The 2nd Applicant responded to this letter and indeed vacated the Respondent's house at Mpaka and proceeded to stay at her homestead at Matsapha. In her testimony she stated that even while she worked at Sidvodvoko, she lived separately from her husband with her children at Matsapha. Pursuant to the agreement to relocate, she was paid housing allowance in the sum of E225.00 for the months of March, April, May and June but the Respondent stopped the payment as from July, 1991.

In its reply, the Respondent does not dispute that it had employed the 2ndApplicant as from 15th March, 1974 as a Secretary and that she got married in terms of Swazi Law and Custom to an employee of the Respondent in 1989.

That soon after the marriage, the Respondent transferred the 2ad Applicant from Sidvokodvo station to Mpaka station and left the husband behind at Sidvokodvo.

It is not in dispute further that the agreement with the 2nd Applicant was entered into on the 1st February, 1991. It is however in dispute whether at the time of the agreement her husband had already been transferred to Mpaka from Sidvokodvo or not.

It was not a term of the Agreement that if the husband was allocated a house at Mpaka the Agreement to pay housing allowance to her would be

terminated. Such term if at all, was implied in the Agreement has not been expressly pleaded by the Respondent in its reply to the particulars of claim.

The 2nd Applicant states in the particulars and in her evidence that she was not consulted prior to the termination of the agreement to pay housing allowance. She avers in the papers and before court that todate she continues to reside at Matsapha but has not been paid the monthly housing allowance from July 1991 todate.

The 2nd Applicant through her union, the 1st Applicant, reported the dispute to the Labour Commissioner. Efforts to conciliate failed, and a certificate of unresolved dispute was issued on the 13th June, 1998.

In its defence, the Respondent admits the agreement entered into between the 2nd Applicant and itself and that the 2ndApplicant moved out of the house pursuant to the Agreement to reside at her homestead at Matsapha.

The Respondent avers further that in July 1991, the payment of the allowance was stopped because the husband of the 2nd Applicant had been transferred to Mpaka station and was allocated the same house which had earlier on been vacated by the 2nd Applicant.

It is the Respondent's case that the 2nd Applicant was no longer entitled to the housing allowance by virtue of the fact that she was now resident in the Respondent's house with her husband and enjoyed all subsidies thereafter. The Respondent adds that the 2nd Applicant was advised of reasons for the termination of the agreement based on the above reason in that Respondent's policy on married employees who reside in company houses is that neither is entitled to housing allowance.

In support of the alleged company policy, the Respondent relied on a note entitled "Accommodation &. Housing Allowance Married Female Employees" written by Mr. J. R. Avery, Chief Executive Officer and dated the 26th October, 1988. The note states that the housing allowance is payable to what is termed the "Legal bread winner" which is explained therein to mean the husband. The circular reads further, "As soon as a female employee marries, the allowance or the allocation of accommodation falls away and is withdrawn as from the month following the marriage. "

There is no evidence that the contents of this note had specifically been communicated to the 2nd Applicant at the time she entered into Agreement with the Respondent. What is not in dispute is that the Respondent was aware of her marital status at the time it agreed to pay allowances to her. The Chief Executive Officer furthermore in the said note points to some exception to the general policy in respect of two instances, where he had been obliged to "confirm the decision to pay this allowance to two married lady employees on a personal to holder (P. T. H) basis " due to the original wording in their letters of employment. Indeed the Applicant testified under cross examination that some married couples at the Respondent's undertaking don't share same houses while others do. She had explained to the Respondent that she wanted to stay at her homestead at Matsapha. Clearly the policy not to pay house allowance to married ladies is not a hard and fast rule as can be deduced from this note. The note was directed to supervisors to "make the above known to those female employees under their charge for their information and guidance. "

There is no documentary evidence or otherwise that the Agreement between the 2nd Applicant and the Respondent was subject to the guidelines in the above note.

Indeed in a letter dated 14th June, 1996 to the 2nd Applicant by Mr. W. D. Shongwe the Respondent's Administrative Officer, Mr. Shongwe states the following; "The policy on the allocation of accommodation to couples, both of whom are employees may not be one that is codified, but it is common sense and one that applies to all civilized society. "

The letter was written about five years from the time when the dispute arose as the 2nd Applicant continued to challenge the stoppage of the housing allowance.

It is also of note that the recognized union at the undertaking in a letter dated the 6th June, 1996 directed to Mr. Shongwe stated the following " I don't know the Railway Policy you are talking about. Could you please give me a copy of that policy. "

Is it reasonable to infer the policy alluded to, into the agreement between the 2nd Applicant and the Respondent? Such inference would be based on prove of the existence of the policy and its notoriety in the industry or in the sphere of employment in the Kingdom of Swaziland to the extend that the court

ought to take judicial notice of it, and infer it into the agreement between the 2nd Applicant and the Respondent.

I must observe that the onus of proving existence of such a policy lies on the Respondent. The policy must be shown to have existed for a long time and that it was well known to the parties and that it was not contrary to any laws in Swaziland.

Considering the evidence before us, the Respondent did not attempt to make out such a case and has in the result failed to prove existence of such a policy that ought to be reasonably implied into the Agreement between the 2nd Applicant and the Respondent.

In any event, any tacit inference of such a policy into the Agreement ought to be specifically pleaded in the Respondent's reply, which the Respondent failed to do.

As a matter of fact and as stated earlier by the time the Agreement was entered into, it was common knowledge that the 2nd Applicant's husband was employed by the Respondent and was entitled to company housing at his work station.

It is common cause that the housing allowances have been reviewed from time to time since 1991 at the Respondent's undertaking and the amounts varied from one category of employees to another. It follows that if the Applicant is successful, she would be entitled to the performance of the Agreement as reviewed from time to time by the Respondent.

The issue as to whether the 2nd Applicant resides at Matsapha or not, and whether or not at the time the agreement to vacate the house and receive house allowance was concluded, her husband was already stationed at Mpaka has to be determined with reference to the evidence of the 2nd Applicant, AW3, the husband of the 2nd Applicant, and that of the witnesses for the Respondent.

AW3, the husband of the 2nd Applicant told the court that when he was transferred to Mpaka he was promised a house but the employees who occupied the particular house took time to vacate it. While he waited for accommodation he applied for housing allowance. Mr. E. V. Kunene, the Director of Railway Police wrote to AW3 who was a Police constable at

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Mpaka Railway Station on the 10th April, 1990 in reply to his application for housing allowance dated 10th January, 1990 and 5th April, 1990. In the letter Mr. Kunene states that Mr. Mkhonta's application for housing allowance was unsuccessful because he was occupying house No. 0143, a Railway house allocated to his wife who was also a Railway employee. It is common cause that this reference was to the 2nd Applicant.

Whereas the Respondent does not dispute the contents of paragraph 9 of the Particulars of Claim to the effect that the 2nd Applicant entered into the Agreement to vacate her house on the 1st February, 1991 and that she received housing allowance for four months subsequent thereto, the letter by Mr. E. V. Kunene is a confirmation that AW3 had already been transferred to Mpaka by the time the agreement between his wife and the Respondent was entered into, AW3 told the court that as of February, 1991, when the 2nd Applicant vacated her house he had already been transferred to Mpaka, contrary to the averments of the Respondent that he was still based at Sidvodvoko. As at the time of the hearing of this case, he was based at Mbabane offices of the Respondent on relief basis but still retained his house at Mpaka though his wife continued to reside at Matsapha.

The Administrator of the Respondent Mr. Wilson D. Shongwe testified as RW1. He had worked for the Respondent for 30 years whereas the 2nd Applicant had served the Respondent for 27 years. They knew each other well.

He narrated how the 2nd Applicant requested that she be allowed to stay at home at Matsapha and be paid housing allowance. After she surrendered the house the husband was in July 1991 transferred to Mpaka and was allocated a house. Indeed it was the same house his wife had vacated. He told the court that it was expected that upon his transfer, he would stay with his wife as per company policy. He is the officer who produced the note written by the Chief Executive Officer earlier referred to.

The allegation that Mr. Mkhonta was transferred to Mpaka in July, 1991 is contradicted by "A6" written by Mr. E. V. Kunene on the 10th April, 1990 which shows that as of that date, Mr. Mkhonta was already at Mpaka and apparently occupying house No. 0143.

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To this extent, the evidence of the Respondent as to when Mr. Mkhonta was transferred to Mpaka is unreliable. The 2nd Applicant and her husband are in agreement that as at the time she vacated her house at Mpaka, her husband had already been transferred to that station. It follows that the Agreement to give her house allowance was notwithstanding that fact. The 2nd Applicant comes across as a credible witness worthy of belief and her version of events is cogent and in our view probably true. She is corroborated by AW3, the husband in material respects. We find that the 2nd Applicant continues to live at Matsapha. The Respondent's version that she lives at Mpaka is discredited and unworthy of belief. Infact the Applicant lived at Matsapha even while she and her husband were both stationed at Sidvokodvo. This piece of her evidence was not challenged.

Although it makes no difference to the Applicant's case whether or not Mr. Mkhonta was already at Mpaka

at the time the agreement was entered into, if indeed this was the case as we have found, it confirms our finding that the agreement, as indeed, clearly is, was not subject to a subsequent transfer of the husband but was one between an employee and her employer regarding terms and conditions of service, namely housing allowance, which right duly accrued but was subsequently withdrawn in breach of that contractual obligation.

In the circumstances, we find that the Applicant is entitled to her claim in terms of the agreement and the particulars of claim. She continues to serve the Respondent as a Secretary at Mpaka and resides at Matsapha in terms of the agreement.

In the result, we make the following order:

The Applicant is to be paid housing allowance as agreed on the 1st February, 1991 in the sum of E225 per month from the date of stoppage in July 1991 and subsequently thereto on a monthly basis, including all subsequent reviews of the amount of allowance entitled to her per month up to the date of this judgement and thereafter until such payment has been lawfully terminated.

The computation of the said allowance is to be filed with the court for approval within fourteen days from the date of this judgement.

There will be no order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT