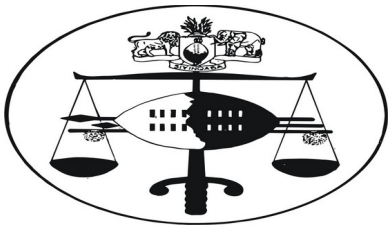

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case No.398/2004

In the matter between:

EDWARD J. KUNENE **Applicant**

and

SWAZILAND RAILWAY **Respondent**

Neutral citation: *Edward J. Kunene v. Swaziland Railway (398/04 [2012]* SZIC 7 (**MARCH 2012)**

Coram: NKONYANE J,
(Sitting with G. Ndzinisa
Nominated Member of the Court)

Heard: **18 JULY 2011**

Delivered: **02 APRIL 2012**

Summary:
Applicant employed by the Respondent as a diesel train driver and involved in an accident that left him permanently disabled. Respondent operating a separate personal accident insurance for certain categories of its employees from grade C1 and above. Question: whether the Applicant who was on grade C2 was covered. Court finds that the Applicant was covered because he was on grade C2when the accident happened and there was no documentary evidence presented to Court

proving that the Applicant was excluded. Parole evidence rule applied in interpreting the Respondent's document containing the personal accident insurance policy.

JUDGMENT
02.04.12

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[1] The Applicant is a former employee of the Respondent. He was first employed by the Respondent on 23 November 1978 as a Coal Passer. On 11 May 1992 he was promoted to the position of Diesel Train Driver and was placed on grade C2.

[2] During the course of the employment the Applicant was on 06 December 1997 involved in a train accident. He was finally retired on medical grounds on 30 May 2002.

[3] The doctor's report Annexure "ED 2" shows that the Applicant's injury or disablement was permanent and the loss of earning capacity arising from the disablement was assessed and found to be 75%. The Applicant was accordingly paid the sum of E27,000.00 by the Respondent in terms of the Workmen's Compensation Act No.7 of 1983. The Applicant also received a sum of E69,992.90 as terminal benefits. The Applicant was also paid a sum of E180,600.00 by the

Respondent as an *ex gratia* payment in connection with the injury that he sustained whilst on duty.

[4] The evidence further revealed that when the Applicant was retired on medical grounds there was a personal accident insurance cover that was operating at the Respondent's place, Annexure "A" of the Applicant's application. The Applicant approached the Respondent and asked to be paid compensation in terms of the personal accident insurance. The Respondent refused to pay compensation to the Applicant in terms of its insurance policy. The Applicant accordingly reported a dispute with the Conciliation, Mediation and Arbitration Commission (CMAC"). The dispute was not resolved hence the present application for the determination of the unresolved dispute.

[5] The facts of the case are not in dispute. The only dispute between the parties is whether or not the Applicant was covered by the Respondent's insurance policy.

[6] The Applicant's case was that he was covered under the Respondent's insurance policy because at the time that the accident occurred he was on salary grade C2, and the insurance cover was for those employees that were on salary grade C1 and above. At this point is important to reproduce the document in full for ease of reference. The document appears as follows:-

S W A Z I L A N D R A I L W A Y

MEMORANDUM TO: GRADES C1 AND ABOVE
HEADS OF DEPARTMENT

cc. T. A. s

INSURANCE

Staff in grades C1 and above, including expatriate staff, but excluding USAID T.A.'S are not covered by Workmen's Compensation. These grates, however are specially catered for by a personal accident insurance that is paid by Swaziland Railway, the details of which are as follows:-

COVER	:	Death or bodily injury caused by accident
INSURED PERSONS	:	All staff in C1 and above, Including expatriate Staff.
BENEFITS		
Death	:	5 x Annual Remuneration
Disablement		100%) of 5 years remuneration
Temporary Total	:	100% weekly earnings for a Period not exceeding 104 weeks.
Medical Expenses	:	E15 000 any one of the Insured Persons, any one accident
REMARKS	:	Cover is on a 24 hour basis
	:	2. The definition of Remuneration

[7] It was not in dispute that the Applicant was on salary grade C2 when the accident occurred. It was also not in dispute that the insurance policy was applicable to those on grade C1 and above. It is therefore clear that the Applicant was covered by insurance policy.

[8] On behalf of the Respondent, RW2 Musa Mkhonta told the court during cross examination that the Applicant as the train driver who claimed overtime was not covered. He further told the court that there were instructions that were issued stating certain exceptions from the insurance cover. He also said there was another document applicable to those who worked overtime. He admitted under cross examination that the insurance policy document Annexure "ED 3" was the only document that set out the rules of the cover. RW1 failed to produce the documents that he said contained the exceptions to the policy cover. There was also no evidence that if such documents existed, they were brought to the attention of the Applicant and that he was therefore aware of them.

[9] During submissions the Respondent's counsel told the court that the insurance policy was meant for those employees that were not covered by the Workmen's Compensation Act. There was no evidence before the court, nor was it suggested that the Applicant was told to choose whether to claim under the Respondent's own insurance cover or to claim under the Workmen's Compensation Act. From the evidence before the Court there was no clear rationale for the discrimination between the Respondent's employees. The Court will not countenance a manifestly discriminatory company policy.

[10] From the evidence before the court it would appear in terms of Annexure "ED 2" that the injury on duty report was made as a matter of course as per the requirement of the law. It cannot therefore be assumed that when the injury on duty was reported, it meant that the Applicant was choosing to be compensated in terms of the Workmen's Compensation Act and not by the Respondent's personal accident insurance.

[11] It was also argued on behalf of the Respondent that since the Applicant had the services of an attorney when the amount of E27,000.00 was paid to him, he had therefore chosen to be compensated under the Workmen's Compensation Act and not under the Respondent's personal insurance policy. There was however no evidence that the Applicant did give his attorney, Mr. P. Dunseith, a specific mandate to refrain from pursuing compensation in terms of the Respondent's personal accident insurance policy and to only accept compensation due under the Workmen's Compensation Act.

[12] From the evidence before the court it was clear that the Applicant had no intention of waiving his right to claim under the Respondent's personal accident insurance policy. During the cross examination he responded as follows:-

> **"Q. Did you ask the Respondent what the money was for?**
>
> **A. No, but I thought it was from MVA.**
>
> **Q. Did you make any inquiries?**
>
> **A. I relied on my lawyer Peter Dunseith for everything.**
>
> **Q. So you were legally represented when the money was paid.**
>
> **A. Yes.**
>
> **Q. I put it to you that you knew what the money was for as you were legally represented.**
>
> **A. I accepted the money as my lawyer was involved but I was expecting to be paid money from the company insurance."**

[13] It is clear from this evidence that the Applicant never waived his right to claim under the company personal accident insurance policy.

[14] The Respondents failed to bring any documentary evidence varying the terms of the insurance policy. In this regard the observations of the Appellate Division are instructive. In the case of **Lourey V. Steedman 1914 AD 532 at page 543** the court held that;

> **"When a contract has once been reduced to writing no evidence may be given of its terms except the document itself nor may the contents of such document be contradicted, altered, added to or varied by oral evidence."**

[15] This principle of the law should apply in the present case. The Applicant having shown that he was covered by the Respondent's own personal accident insurance, the evidentiary burden shifted to the Respondent to prove on a balance of probabilities that he was not. On the evidence before the Court, the Respondent has failed to discharge that burden.

[16] The court will therefore come to the conclusion that the Applicant was able to prove that he was covered by the Respondent's policy.

[17] On behalf of the Respondent it was also argued that the Applicant was not entitled to 100% of 5 years remuneration, but to a percentage not exceeding 100% of 5 years remuneration. From the doctor's report Annexure "ED2" the Applicant's disablement was fixed at 75%. The Applicant did not dispute this figure. In terms of the policy therefore the Applicant is entitled to 75% of 5 years remuneration.

[18] The Applicant did not die. He cannot therefore claim payment based on the formula of 5 times annual remuneration. That is a formula for death benefit in terms of the insurance policy of the Respondent.

[19] The Applicant also applied for the payment of interest at 9% per annum from 06th December 1997 to date of payment. The Respondent did not challenge this application both in its pleadings and during submissions. The prayer will be granted accordingly.

[20] Taking into account all the evidence before the court and also all the circumstances of this case the court will make the following order;

a) That the Respondent pays the Applicant the following amount E51,756.00 x 5 x 75% = E194,085.00.

b) Interest at 9% per annum from 06th December 1997 to date of payment.

c) Costs of suit.

[19] The members agree.

NKONYANE J

For Applicant : Mr. S. P. MAMBA
Mamba Attorneys

For Respondent : Mr. S. M. Simelane

Madau & Simelane Attorneys