IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 200/19

In the matter between:

SWAZILAND RAILWAY STAFF ASSOCIATION 1st Applicant

SWAZILAND TRANSPORT COMMUNICATION

AND ALLIED WORKERS UNION 2nd Applicant

And

SWAZILAND RAILWAY Respondent

Neutral citation: Swaziland Railway Staff Association and Swaziland Transport Communication and Allied Workers Union v Swaziland Railway *(200/2019)* [2019] *SZIC 117* (03 November 2019)

Coram: **S. NSIBANDE JP**

(Sitting with Nominated Members of the Court Mr N.R. Manana and Mr M.P. Dlamini)

Heard: 28 October 2019

Delivered: 03 December 2019

JUDGMENT

[1] The 1st and 2nd Applicants are employee organisations duly registered in terms of the **Industrial Relations Act 2000** (as amended) and recognised as such by the Respondent.

[2] The Respondent is a public enterprise and body corporate established in terms of **Section 3** of the **Swaziland Railway Act, 1962** and having its principal place of business at Eswatini Railways Building, Dzeliwe Street, Mbabane. The Respondent is the employer of the members of 1st and 2nd Respondents.

[3] On or about 24th August 2018, the parties signed a Memorandum of Agreement regarding a salary review report in terms of which the parties agreed to adopt the Final Salary Review Report, amongst other things. The Applicants have now applied to Court for the lodging and registration of Memorandum of Agreement and for it to be made an order of the Court. They seek costs, in the event of opposition and any other and/or alternative relief.

[4] The application is opposed by the Respondent which filed an opposing affidavit attested to by its legal advisor Phindile Sikhondze who sets out the Respondent's opposition to be based on the following;

4.1 that the agreement in its current form does not comply with the **Industrial Relations Act 2000** (as amended). In particular, that the agreement does not meet the requirements of **Section 55 (1) (b) (c) and (d)**.

4.2 that the Respondent being a public enterprise is subject to the provisions of the **Public Enterprise (Control and Monitoring) Act, 1989**, and that in terms of the Act the Respondent is obliged to obtain the approval of the Standing Committee on Public Enterprises (**SCOPE**) before an agreement relating to the variation of terms of employment of the enterprise can be adjusted. It was submitted that there was no approval given by **SCOPE** with regard to the agreement before Court and that it could therefore not be registered until such approval was given.

[5] Having set out the Respondent's basis for objection to the registration of the agreement, the Respondent then pointed out that it was not opposed to the essence and wording of the agreement but sought only time to be allowed to undertake and conclude the approval process with **SCOPE** and to make the agreement legally complaint. The Respondent's attorney stressed this point at the hearing of this matter.

[6] In response to the Respondent's answer the Applicants filed a replying affidavit in which they raised a point of law and further replied to the

Respondent's answer. The point raised by Applicants questioned the authority of the respondent's legal advisor to place anything before the Court on behalf of the Respondent.

[7] The Applicants framed the point as follows:-

*"In terms of **Section 15(3)(d)** of the **Swaziland Railway Act, 1962**, the legal advisor can not oppose this application. The Act of Parliament is very clear that it is the Chief Executive Officer who shall defend proceedings in any Court on behalf of the Respondent."*

Section 15(3)(d) reads as follows:

(3) For the due performance of his function the Chief Executive Officer shall, subject to the provisions of subsection (4), be empowered –

(a) …

(d) on behalf of the Railway to sign all necessary documents and to institute or defend proceedings in any court, which power shall include the power of substitution."

In a bid to counter the Applicants' point *in limine*, the Respondent filed a resolution signed by the Chief Executive Officer of Eswatini Railways, Mr. Stephenson Zweli Ngubane. In terms of the resolution, the CEO purported to appoint Phindile Banele Sikhondze in her capacity as legal advisor to sign all necessary documents, accept service of process and to institute or defend all

proceedings in any Court and/or Tribunal involving Eswatini Railways. This was supposedly in the exercise of his power of substitution as set out in **Section 15(3)(d)**.

The Applicants pointed out that the Resolution was undated and questioned its legality. The issue of the deponent's authority was raised after the answering affidavit was filed. In response the respondent filed the resolution. We are of the view that the CEO was therefore ratifying the decision to authorize the legal advisor to oppose the application. On the basis of the judgement in **Shell Oil Swaziland (PTY) LTD v Motor World (Pty) Ltd t/a Sir Motors Appeal Case No. 23/2006** case we accept the resolution even though the respondent was not, as of right, entitled to file any further papers. We do so being mindful of the approach stated in the **Shell Oil** case that "*the rule against new matter in reply is not absolute but should be applied with a fair measure of common sense*." A fair measure of common sense directs that we accept the resolution particularly since the Applicants are not prejudiced by such approach. Further, regard is to be had to the judgment of Sapire ACJ (as he then was) in the matter of **Kingsburg Exports Limited and Seven Others (Applicants) v Commissioner of Customs & Excise and Attorney General (Unreported High Court Case No. 216/97)**.

Faced with a similar challenge where the Respondents pointed out that the letters of authority on which the deponent relied did not mention the present

litigation and did not constitute proof of authority to the deponent to "swear to this affidavit," Judge Sapire had this to say –

> "*This point had to fail however as no-one requires authority to give evidence in any matter, whether it be an action or an application. The giving of evidence is a personal act of the witness whether the evidence is given viva voce or on affidavit. No individual requires the authority of any party to give evidence for or against that party in any proceedings.*"

Citing Barclays National Bank Ltd v Love 1975 (2) SA 514 (D) at 515 EE and 515 F-G, Judge Sapire quoted with approval the following paragraph:- *"A witness, also when a deponent, may testify even if he has no authority to bring, withdrawn or otherwise deal with the application itself."*

In the circumstances we reject the point that the matter is unopposed for lack of authority.

[8] A number of issues were raised regarding the agreement and why it ought not be registered at this point – that it did not comply with the **Industrial Relations Act**, that it was not approved by the board of directors of the Respondent and that it was prerequisite under the **Public Enterprise (Control and Monitoring) Act** that the respondent obtains the approval of SCOPE before any agreement to vary terms and conditions of employment be given effect.

[9] The Court has a discretion whether to register an agreement or not. It is not merely a rubber stamp meant to register applications upon presentation. (see **Ocean Shongwe v Roots Construction IC Case No. 62/2008**). We must consider whether the agreement is not in conflict with **Section 10 of The Public Enterprise (Control and Monitoring) Act** in that there was no approval for the same. **Section 10 (1)** of the Act reads:

> "***No Category A public Enterprise shall do any of the following without the approval in writing of the Minister responsible, acting in consultation with the Standing Committee:***
>
> ***(a)……***
>
> ***(e) make any major adjustment to the level or structure of staff salaries and wages or other terms and conditions of service of its staff.***

[10] It appears to us that there has been no Ministerial approval for the Respondent to make the adjustments agreed upon with the Applicants. Had there been such approval, it would not have been necessary for the report compiled by the CEO on 11th January 2019 giving an update on the salary review implementation. In the circumstances it appears to us that the lack of SCOPE approval renders the agreement void given the binding nature of the Act on all public enterprises. It is not, in our view necessary to consider the other issues

raised by the Respondent regarding the agreement. The Court is unable to register the agreement in these circumstances.

[11] Having considered the full circumstances of this matter and the Respondent's submissions that it seeks only to ensure that the agreement complies with the law, we are of the view that it would be in the interests of both parties and good industrial relations to postpone judgement on the application to the 2nd March 2020 and that the Respondent be directed to file an affidavit on the progress it has made to regularise the agreement on or before 26th February 2020. We make no order as to costs.

The Members agree.

For Applicants: Ms. Mkhabela (Mkhabela Attorney)

For Respondent: Mr Z. Jele (Robinson Betram Attorneys)