

IN THE COURT OF APPEAL OF SWAZILAND  
HELD AT MBABANE

APPEAL CASE NO. 1442/93

In the matter between

The Trustees of Swaziland Railway  
Gratuity Scheme

Appellant

and

Swaziland Transport and Allied Workers  
Union

Respondent

Coram

Leon JA  
Browde JA  
Steyn JA

For Appellant

For Respondent

BROWDE JA

The Swaziland Railway Gratuity Scheme ("the Scheme") is a fund constituted by the employer, the Swaziland Railway, in order to provide gratuities for its employees under certain circumstances, Rule 8 of the Scheme reads as follows:

8. Payment of Gratuities

The following shall be entitled to a gratuity calculated under Rule 9

(a) A member who has been employed under a written Contract of Service for a period of service of not less than 3 years and who leaves the service on completion of such period of service or my extension thereto; provided that if such a

member cannot complete

his contract for reasons outside his control, the Trustees may in their absolute discretion pay such gratuity or a portion thereof as determined in Rule 9.

(b) A member who leaves the service after twenty or more years of membership or reaches the age of fifty-five years after not less than five years of membership whichever event occurs first

c) Subject to Mule 10, the dependants or the estate of a member who dies during service, after five years of members:

(d) A member who leaves the service on the grounds of ill-health, after five years of membership.

(e) A female member who leaves the service to marry, after five years of membership.

Provided that in a case falling under Clauses (c), (d) or (e) the Trustees, acting in their sole and absolute discretion may pay such a gratuity in respect of a member with less than five years membership.

(f) A member who is discharged from the service on the grounds of redundancy.

It will readily be observed that the gratuities are provided as a condition of their employment to employees as an incentive to the latter to give long service to the employer. A member employee who is discharged from service on the grounds of redundancy, however, is entitled to a gratuity without reference to his length of service no doubt because the termination of his employment does not reflect on any conduct of the employee.

In its Notice of Application in the High Court the Respondent sought an order declaring that 76 members of the Respondent who had been retrenched by the Swaziland Railway, were entitled to a gratuity in terms of Rule 8(f) above referred to.

The appellant, in opposing the application, alleged the

following in its answering affidavit:-

"9.1 All the retrenched employees were paid severance allowances in terms of the provisions of Section 34 of the Employment Act No. 5 of 1980.

9.2 The said severance allowances were equal to or exceeded the respective amounts payable by way of gratuity.

9.3 In terms of Section 34 (3) of the Employment Act, the Swaziland Railway is entitled to set-off the amount of gratuity payable against the severance allowance paid in respect of each retrenched employee.

9.4 In the premises, no gratuity is payable. "

The Respondent Union, on behalf of the employees, has asserted that Section 34 of the Employment Act does not entitle nor empower the Appellant to recover from the beneficiaries (the members of the Scheme) any amount which may be paid to them as severance allowances and that the Rules of the Scheme do not empower the Appellant to withhold payment of gratuity to the retrenched members whether or not the latter received payment of severance allowances.

Sapire, AG in the Court below decided the dispute in favour of the Respondent and declared that the retrenched members were entitled to payment of the gratuities due to them in terms of the scheme.

It is this decision which is the subject matter of this appeal.

It is common cause that on or about 30th September, 1992 the Swaziland Railway retrenched 76 employees on the grounds of redundancy. It is also common cause that because they were retrenched on the grounds of redundancy the employees were entitled to severance allowances in terms of Section 34(1) of the Employment Act which reads as follows:-

"34 (1) Subject to Sub-Section (2) (3) and (6) (which are irrelevant to the dispute) if the services of an employee

are terminated by his employer other than under the provisions of Section 36(a) to (j) the employee shall be paid, as part of the benefits accruing under his contract of service, a severance allowance amounting to ten working days' wages for each

completed year in excess of one year that he has been continuously employed by the employer "

Section 36 lays down the grounds upon which it is fair for an employer to terminate the service of an employee and the provisions 36(a) to (j) are all grounds which are attributable in one way or another to dereliction of duty on the part of the employee. This does not apply to grounds (k) and (I). (I) reads "became the employee is redundant" it is, therefore, perfectly clear that the legislature intended that employees who were retrenched on the grounds of redundancy should be entitled to severance allowances.

There is no provision in the Act which empowers the employer to set off, against the severance allowance, any gratuity which might, be due to the employee under his contract of employment but Mr. Kades, who argued the appeal before us, submitted that if the employee is paid both the severance allowance and the gratuity he would be receiving "double severance pay".

He bases this submission on the effect of Section 34(3)-of the Act the relevant portion of which reads as follows:-

"34(3)

If an employer operates or participates in, and makes any contribution in

any gratuity, pension or provident fund. which is operated for the benefit of

his employees, the employer in termination of employment shall be entitled to repayment from the gratuity, pension or provident fund equal to the employer's total contribution to that gratuity, pension or provident fund in respect of the employee

to whom a severance allowance is to be paid under this section"

Mr. Kades submitted to us that since the appellant has to pay a gratuity in terms of the Rules of the Scheme and also has to refund the contribution made to the fund by the employer this amounts to a double allowance to the employee. In my view there is no substance in this submission. It ignores, as was argued before us by Mr. Flynn on behalf of the respondent, the distinction between the employees contractual right to the gratuity in terms of Rule 8(f) and his statutory right to a severance allowance in terms of the Act. I agree with Sapire, ACJ who said that the payment of the gratuity is " an unequivocal contractual obligation undertaken by the (appellant) which is unaffected by the provisions of Section 34 of the Employment Act". The one has nothing to do with the other; the allowance is statutorily- imposed, the gratuity is a contractual condition of employment.

It remains to consider whether Mr. Kades's further argument is valid. He has submitted that there is a presumption in the interpretation of a statute that unless the contrary appears the legislature did not intend an unfair, unjust or unreasonable result or consequence. I accept this presumption and turn to consider whether it is unfair, unjust or unreasonable for the appellant to have to pay the gratuity and also to refund its contribution to the employer.

It seems to me that the purpose of legislating for the repayment to an employer of contributions he has undertaken to make to a fund constituted in order to provide a gratuity or a pension for the employee, is to ensure that the employer is not seriously disadvantaged by being obliged by statute to pay severance allowances. Added to this is the fact that the trustees of the

fund are empowered by Rule 7 to "lend, invest, put out at interest, place on deposits make advances or otherwise deal with the monies of the fund .....in such manner as they may determine " It is obviously envisaged that with prudent use of the money and wise investment the fund would both earn interest from the contributions made by the employer as well as achieving capital appreciation. If this happens the fund should be able to repay the contributions to an amount as laid down in Section 34(4) of the Act, that does not exceed the total amount of the severance allowance, without the fund suffering any undue hardship. In fact it may often happen that the amount of the severance allowances is less than the contributions made to the scheme by the employer. In that case on refunding the contributions to the extent of the allowance the fund would have a balance of capital as well, of course, the interest and capital accretion to which I have already referred.

I see no valid basis for the suggestion that the refund of the contributions leads to a position which is unfair, unjust or unreasonable.

The appeal is dismissed with costs. However by consent the order of the High Court is altered to read: "The respondent is obliged to pay a gratuity in terms of Rule 8(f) of the scheme to those persons retrenched who were members of the scheme".

J BROWDE, JA

I agree

R.N. LEON, JA

I agree

J.H. STEYN, JA