IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

CASE NO. 255/2018

In the matter between:

ATUSWA & 60 OTHERS	**APPLICANT**
and	
SWAZILAND MEAT INDUSTRIES [PTY] LTD	**RESPONDENT**

Neutral citation : Atuswa & 60 Others *vs Swaziland Meat Industries [PTY] Ltd 255/2018) [2018] SZIC 146/18 (2018)*

CORAM:

XOLISA HLATSHWAYO	**:**	**ACTING JUDGE**
NKHOSINGIPHILE DLAMINI	**:**	**MEMBER**
DAN MMANGO	**:**	**MEMBER**

DATE HEARD	:	10 DECEMBER 2018
DATE DELIVERED	:	11 MARCH 2019

JUDGEMENT

[1] Serving before court is an application for the following orders;

"1. That the Respondent be ordered and directed to pay to all further applicants their 13th cheque for the year 2017 equivalent to a month's wages.

2. Costs of this Application be paid by the party or parties opposing the Application;

6. Further and/ or alternative relief as the Court may deem appropriate"

[2] The Applicant clarified that the matter had been instituted whilst the Applicants were perceived to be affiliated with ATUSWA. When the proceedings were instituted, there were pending matters regarding the status of relationship between ATUSWA and SMAWU. The outcome is such that the individual unions which were presumed to be amalgamated into ATUSWA have reverted to be individual entities, as such there was an unopposed application for the amendment of Applicant from being ATUSWA to being SMAWU. The Respondent did not object to such application despite the obvious failure to properly amend through the specified procedure.

[3] The Respondent also mentioned that it will not pursue the point raised about Boy Nkomonye, as it would like the matter to be decisively dealt with.

[4] As was stated in **Gideon Gama v Peter Masango Appeal Case 20/1997** the court stated that *"rules governing procedure such as Rules of Court are not made to enable the lawyers representing parties to a dispute to score points off on another, without advancing the resolution of that dispute in any way they are guidelines aimed at obliging the litigants to define the issues to be determined, within a reasonable time, enabling the court, as a consequence to organize their administration as quickly, effectively and fairly as possible"*

[5] The court appreciates the attitude of the Respondent's counsel.

[6] The Applicant submitted that the method of calculation was a monthly accumulation of the total sum over a period of a year (12 months) hence the normal rate of the 13th check being equivalent to a month's salary. The calculations of the monthly accrual was illustrated for the court's convenience and understanding.

[7] Further submission is to the effect that there was a strike action by the Applicants from 21st November 2016 until 30th November 2016. The submission is that bonus issue did not form part of the negotiation when the strike commenced.

[8] Prior to the strike action, on the 7th November 2016, the Respondent addressed the letter which reads;

"RE: NOTICE OF INTENTION TO STRIKE

Thank you for your letter which was dated the 3rd of November 2016 and we acknowledge receipt of it.

Please be informed that during the strike action all the employees taking part in the strike will be affected by the following:

- *The principle of no work, no pay will apply,*
- *The 13th cheque is at Management's discretion and if the strike action proceeds Management will have no other alternative but not to pay this,*
- *Teas, lunches and rations will also not be available for employees during the period of the strike*

I would like to bring to your notice that there are employees on essential services who will as per our Recognition Agreement not take part in the strike action. Please see list of essential services as listed below:

1. Shiftmen (Ncamiso Dlamini, SIthembiso Dlamini, Mxolisi Maziya and Dumisani Mlotsa

2. Sanitary (Bonginkhosi Dlamini, Thokozani Dlamini and Bongani Mhlanga)

Also be informed that the employees at the Piggery will not take part in the strike action as they are regarded as essential services.

Yours Faithfully

Senhle Dlamini

Personnel Officer

Cc: Commissioner of Labour

CMAC Commissioner

SMI Shopstewards

SMI Notice Board & PPI Notice Board

[9] The submission by Applicant is that upon resumption of work, everything returned to normalcy including payment of salaries and overtime payments where necessary.

[10] In December 2016, and in accordance with the Respondent's letter of the 7th November 2016, all the employees who participated in the strike, were not paid the 13th cheque. Those who did not receive this cheque included the Applicants, some of whom are no longer employed by the Respondent, as they were retrenched in 2017.

[11] The Applicant submits that some of the members of Applicant who did not partake in the strike were paid the 13th cheque. This non-payment of the

13th cheque to the striking employees and payment to non-striking employees was submitted to be, firstly unfair discrimination and a unilateral change to the terms and conditions of employment, much against the provisions of s26 Employment Act 1980 (as amended). The court was referred to the case of ***Swaziland Building Society v Swaziland Union of Financial Institutions and Allied Workers Appeal Case 1/2009***, which addresses the question of perceived unilateral removal of a benefit.

[12] The Applicant argued that the non-payment of the 13th cheque to Applicants in the sum of one month's salary is unfair labour practice and a unilateral removal of a benefit, which had accrued since the beginning of the year.

[13] The Applicant also submitted that the non-payment of the 13th Cheque is also unfair labour practice that results in unfair discrimination against the employees who engaged in a protected strike. The case of ***Food and Allied Workers' Union & Others v Pets Products (Pty) Ltd C283/99*** was in support of the submission of discrimination.

[14] A Collective Agreement was concluded on 30th November 2016 and the Applicant's submission is that Item 6 thereof states that "all other terms and conditions of service will remain unchanged." The Applicant submitted that the 13th cheque fell under those terms and conditions that were not to change, and the Respondent was bound thereby. The non-

payment of the 13th cheque was argued to be a breach of the provisions of the Collective Agreement.

[15] The Applicant submitted that the reason for the discrimination was their engagement in the protected strike. Further, the engagement in the lawful strike was their right.

[17] The Applicant referred to the ***Harksen v Lane & Others 1998 (1) SA 300 at 325*** case to test whether there was discrimination and submitted that discrimination was established *in casu*. The test is;

(a) Does the provision differentiate between people or categories of people?

(b) does the differentiation amount to unfair discrimination? This requires a two-stage analysis;

(i) firstly does differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings, or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to unfair discrimination? If it has been found to have been on specified ground, then unfairness will be presumed. If on an unspecified ground, then unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the discrimination on the complaint and other in his or her situation"

[18] The Applicant submitted that the discrimination was not on the specified grounds as envisaged by s29 Employment Act, however the test as set out in the ***Harksen*** case was satisfied because the non-payment of the 13th cheque to the strikers was arbitrary and was in disregard to company conduct and the Collective Agreement and consequently negatively affected the Applicants.

[19] The Applicant submitted that neither motive nor a negotiated outcome are defences to discrimination and the court was referred to the case ***Co-operation Workers Association v The Petroleum Oil & Gas Co-Operative of SA C437/2003*** in support of that argument. Also, that unfairness was assessed on the basis of its impact on the person, to which the submission the case of ***Leonard Dingler (Pty) Ltd 1998 (19) ILJ LC.***

[20] The Applicant submitted that the onus was then to shift to the employer to prove that the discrimination was fair. The submission is that the

Respondent has proffered no clear ground why the 13th cheques were not paid to the Applicants.

[21] The application was thus that the Applicants be paid the 13th cheque and not be punished with total forfeiture since it had partly accrued from January to December 2016 in exception of the strike days between the 21st to 30th November. Further consideration was to be had to that the employees did not take vacation but worked throughout the year except on 25th, 26th December and 31st January.

[22] The Respondent submits the prayers sought by Applicant are not competent for the court to grant. The submissions were in three points; (i) bonus being discretionary, (ii) payment of bonus not being discriminatory, and (iii) the court cannot order the payment if there is unfair discrimination.

[23] The submission is that the bonus *in casu* is a discretionary bonus and it is neither in the employment contract nor the Collective Agreement, and the Applicant could not point to any specific provision where it was provided for.

[24] The Respondent submitted that it is not true that there was a company policy or Collective Agreement which deals with the right to 13th cheque. The submission that there was a practice long established by the Respondent to pay the 13th cheque to its employees was submitted to be discretionary, and not to be reasonably or legitimately expected, especially

in light of the prior warning, in the form of the letter dated 7th November 2016. The Respondent submitted that the consequences of engaging in the strike action was communicated and as such, was to be expected.

[25] The Respondent then submitted that the discretionary bonus was dependent upon the performance of the company. The court was given example of a period of the "foot and mouth" disease when the employees were not paid the 13th cheque.

[26] The Respondent also submitted that the Respondent's conduct of not paying the bonus was not discriminatory. The Respondent's third argument was that, even if the court were to find that its actions were unfairly discriminatory, the court cannot order that they pay the 13th cheques.

[27] The Respondent submitted that the Applicant cannot enforce payment of the 13th cheque because it is not a right and is not contracted anywhere. The concern was that the discrimination argument in the Heads of Argument was raised for the first time in the Applicant's Heads of Argument and was to be disregarded by the court.

[28] The Respondent's submission is that the court cannot compel discretionary bonus. The argument is that many judgments have held that non-payment of bonuses is unfair discrimination and many for the opposing view. Specific reference was made to the case of ***Chemical Workers Industrial***

Union v BP South Africa (1991) 12 ILJ 599 wherein non-strikers were paid. It was submitted that the court held that that is the economic weaponry of the Respondent. Further that by making such reward to those who assisted in sustaining the business, the Respondent is preserving its business and protecting itself.

[29] The Respondent argued that even if the court were to find that there was unfair discrimination, it cannot grant the relief sought because the court will have found that it is unlawful and by ordering payment of bonus to the Applicant would be condoning or compounding the illegitimate conduct of the Respondent. The judgment of ***National Union of Metal Workers of South Africa obo Members v Element Six Production (Pty) Ltd JS 1106/14*** was relied upon in support of the submission, wherein the court held that;

> *"the difficulty in granting the Applicant any form of relief in such circumstances have been identified in both authorities referred to in this judgment. In FAWU, it was held that any form of relief would be to condone or compound the illegitimate conduct of the Respondent (i.e., of rewarding non-striking employees for work done during a protected strike). The Court in this regard deemed a declaratory order prohibiting the repetition of similar conduct as appropriate. To the extent that the Applicant may have sought*

payment of the additional payments made to non-striking employees, a further difficulty is that these amounts are unknown, ..."

[30] The court was urged that, at worst, a caution should issue, if there was a finding of unfair discrimination but not payment as prayed. It was also submitted that the cause of action for the claimed payments, is not even ascertainable, as it neither breach of contract nor delict. Further, that the calculation of the amounts claimed had not been pleaded but were introduced in the Applicant's Heads.

[31] The court, *in casu,* is convinced that there is no specific reference to the 13th cheque claimed, either in any contract of employment submitted before court or the Collective Agreement filed.

[32] The court, however, notes the undisputed fact that the employees of the Respondent were normally paid the 13th cheque with an exception of one specified instance of a "foot and mouth outbreak". That cited exception caused a problem because of lack of clarity on when it affected the Respondent. This being so, because it is alleged and argued on behalf of Respondent that it affected the company's financial performance during the same period as the one in which there was the strike. Paragraph 4.6.1 and 4.7 of Answering Affidavit and the arguments about the company's performance refer on this regard.

[33] In considering whether the payment of the 13th cheque was one of the terms and conditions which were not to be changed, as argued by the Applicant, or even one of the terms and conditions at all, the court has to ascertain what terms and conditions are.

[34] We ordinarily have those obvious terms and conditions of employment which are expressly reduced into writing. Then there are others which are implied by conduct. Can it be said that practice in an employment environment then falls to be understood and interpreted as "terms and condition"?

[35] In casu, in light of the facts, it appears so, especially because of the letter of the 7th December 2016 which was communicating a consequent departure from what would be normal.

[36] It is strongly recommended as follows:

- Where an employer has never paid bonuses to employee then such employer is under no obligation to do so and there is no law which compels it to make such payments. Accordingly, an employee has no right to payment of a bonus where none has ever been paid.
- However, where an employer has paid bonuses in the past, and wishes to discontinue such payment or make any other change regarding the payment of bonuses, such as new conditions for the payment of bonuses or the timing of such payments, then the employer must inform the employees

well in advance to allow them to engage it on the proposed changes. Failure to provide adequate notice and to engage employees on this issue will amount to an unfair labour practice.

[37] Having decided that it indeed was one of the terms and conditions of employment, the court goes on to enquire into the question whether the Respondent was unfairly discriminative in not paying the striking employees the 13th cheque for 2016. The Applicant's claim is argued to rise from having worked the whole year in exception of the strike period (21 to 30 November) but on the other hand, the Respondent has opposed on grounds of poor performance by the company and discretion.

[37] It has been established that there was a differentiation and discrimination between workers who participated in the strike and those who did not. It has to be ascertained if the discrimination was unfair. It is unfair when it is on the grounds listed on s29 of Employment Act; say religion, but there are also unlisted grounds. The discrimination *in casu*, as much as the Respondent submitted that it was as an economic weapon allowed to it to sustain its business, and award those who assisted to keep it afloat, the evidence is that it was a follow-through to the letter of the 7th November 2016. The ***Pack n Stack*** case used in support of the argument is distinguishable in that the "economic weapon" was positively utilized in that case, that is, the award was paid as an incentive to those who worked

through the strike. It was paid once, in expression of gratitude and never again. The position in this case is the opposite and/or reverse, in that, the bonus is normally paid but specifically not paid to the strikers. From the letter of the 7th November 2016, it was obvious that the contents thereof was a threat to the employees who were to strike and the consequent non-payment was a punishment and manifestation of the threat.

[38] It is also apparent from the evidence before court that the financial aspect of the company cannot be solely attributed to the strike that lasted about a week. It is obvious that the alleged shortage of cattle due to "foot and mouth" disease, or other unknown cause, obviously played a big role in affecting the economics of the company. The abridged financials actually show that as at January 2016 the sales stood at E19.2M, at December 2016 it was E24.8M and at January 2017 it was E18.7M. Nowhere has the period from 21 November 2016 to 30 November 2016 been summarized. The figure of an alleged decline of E5M sales due to the strike is not born by any evidence before court. Further, there is the uncontroverted fact that there were overtime payments after the strike, and 13th cheque payments to those who did not partake in the strike, which defeats the submission on financial woes occasioned by the strike.

[39] The Respondent submits that the non-payment of the 13th cheque was in exercise of discretion and the court should not interfere with the same. The

principle that discretion should not be interfered with is true, however it is not absolute. Discretion can only be interfered with if it is exercised in a manner that is *mala fide*, discriminatory, capricious or grossly irregular. In this case, it is evident that the decision was informed by participation in the strike.

[40] In ***Aucamp v SARS (2014) 35 ILJ 1217 (LC)*** it was held that "...even if the benefit is not a guaranteed contractual right per se, the employee could still claim same on the basis of an unfair labour practice if the employee could show that s/he was unfairly deprived of same. An example would be where an employer must exercise a discretion to decide if such benefit accrues to an employee, and exercises such discretion unfairly"

[41] ***Dupper OC et al "Essential Employment Discrimination Law" 2015 Juta*** states that at the heart of discrimination is differentiation, however the latter has a decidedly negative (pejorative) connotation whilst the former is neutral. At page 33 the authors state that "what this means is that differentiation only becomes discrimination once that differentiation takes place for an unacceptable reason".

[42] The court will only delve into the defence of the employer when the case for unfair labour practice and unfair discrimination has been made out by the employees. In ***Ngcobo & Others v Chester Butcheries (2012) 33 ILJ*** the court did not even get to the second part of hearing the defence of the

employer, because the employees failed to prove that they were not paid bonuses because of their engagement in strike, but rather as a result of poor performance by the store.

[43] The Respondent's contention, as supported by the decision in ***National Union of Metal Workers of South Africa obo Members v Element Six Production*** (supra) does not apply *in casu* because in that case, it was the payment the "token" to certain employees which was held to be wrong, thus the court could not then perpetrate the wrongfulness by ordering that even those who were not paid (for whatever reason) should be paid. *In casu,* it is the non-payment that is held as wrong because the reason for the same is the partaking in a legally protected strike, which is the right of the employee, recognized and protected.

[44] It is competent for this court to right the wrong occasioned to the Applicants for the following reasons;

1. the reason for non-payment is unfair and unlawful discrimination because of their right to strike;

2. there is no other plausible reason for the non-payment than that of engagement in the strike, which makes the conduct of the Respondent legally unjustified and an infringement of the right;

3. the discretion to not pay the striking employees was exercised capriciously and *mala fides* in that it was punishment or manifestation of a threat to so punish by not paying the 13th cheque;

4. the court was established to promote good conduct and level the ground in the employment field.

[45] The court has also considered that, the Applicant has brought a claim for payment of the 13th cheque equivalent to a month's salary, it is common cause that there is a period of ten (10) days not worked for which it would be unjust that they benefit for.

[46] Thus the court orders an alternative relief to the prayers made, under prayer 3 as follows:

1. That the Respondent is ordered and directed to pay to the Applicants, in exception of 1st Applicant, their 13th cheque as equivalent to 1 month's salary less the proportion therein of the 10 strike days in November 2016

2. Costs are to be borne by Respondent at party and party scale.

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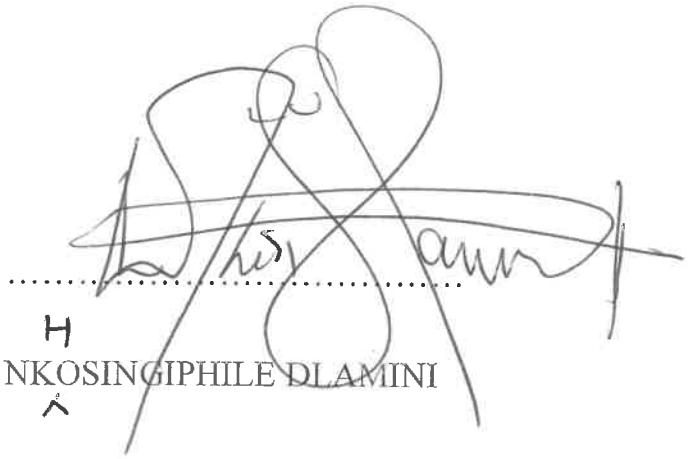
X HLATSHWAYO-MABUZA
ACTING JUDGE OF THE INDUSTRIAL COURT

I agree



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NKOSINGIPHILE DLAMINI

I agree

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DAN MMANGO

For Applicant	:	Mr. D. Dlamini (ATUSWA)
For Respondent	:	Mr. K.J. Motsa (Robinson Bertram Attorneys)