

CONCILIATION, MEDIATION AND ARBITRATION COMMISSION(CMAC)

HELD AT MANZINI SWMZ 249/08

In the arbitration matter between:-

HEZEKIEL DLAMINI & 2 OTHERS Applicant

AND

REEAPS (PTY) LTD Respondent

ARBITRATION AWARD

DATE OF ARBITRATION: 5TH February 2009, 26th February 2009

CORAM:

ARBITRATOR : Commissioner B.Ngcamphalala
FOR APPLICANT : Mr. Tom Simelane
FOR RESPONDENT : Mr. Justice Mavuso

1. DETAILS OF PARTIES AND REPRESENTATION

1.1 The Applicants in the matter are Hezekiel Dlamini, Musa Sithebe and Nompumelelo Giyane, I shall refer to them as the Applicants or Employees.

1.2 The Respondent is Reeaps (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Kingdom of Swaziland and having its principal place of business at Sidvokodvo in the Lubombo region. I shall refer to the Respondent as the Company or the Respondent or the Employer.

2. REPRESENTATION

2.1 During the Arbitration hearing the Applicant was represented by Mr. Tom Simelane. The Respondent was represented by Mr. Justice Mavuso the Respondent's legal representative.

3. BACKGROUND OF DISPUTE

3.1 On the 18th August 2008, the Applicant reported a dispute to the Commissions offices in Manzini. The nature of the dispute was recorded as an unfair dismissal. The dispute is said to have first arisen on the 30th August 2008, it being alleged by the Applicants that the Respondent had terminated their employment contract on the grounds of retrenchment.

3.2 It was alleged by the Applicant that when retrenching them the Respondent had failed and/or refused to comply with the provision of section 40 of The Employment Act of 1980 (as amended). Thus they viewed the termination of their services to be grossly unfair procedurally and substantively.

3.3 The Commission then appointed a Commissioner to conciliate the dispute, however the dispute could not be resolved and a Certificate of Unresolved Dispute was issued.

3.4 In terms of the Certificate of Unresolved Dispute, the issue(s) in dispute were recorded as;

Nompumelelo Giyane

- a) Re-instatement alternatively,
- b) Severance Allowance E 1,818.00
- c) Additional Notice E 727.28.00
- d) Leave Pay E 3,454.5812
- e) months maximum compensation E24, 000.00

Abel Sithebe

- a) 12 months maximum compensation E24, 000.00

Hezekiel Dlamini

- a) 12 Months maximum compensation E15, 600.00

3.5 Further the Applicants argued that the Respondent failed to comply with section 40 of The Employment Act of 1980 (as amended), and further failed to use the LIFO (last in first out) criteria when affecting the retrenchment.

3.6 Respondent on the contrary argued that the retrenchment was fair as it was affected as a result of a down turn in business. The Respondent further averred that there was no procedural flaw in the retrenchment as the Applicants were duly consulted prior to effecting the retrenchment, and further that it had no obligation to comply with section 40 of The Employment Act as only 4 Employees were affected by the retrenchment.

3.7 As a consequence of the dispute remaining unresolved, the parties requested for arbitration, and I was appointed to arbitrate the dispute.

3.8 A pre -arbitration conference was held wherein it was agreed upon, that all disputed and admitted issues remained unchanged.

4. ISSUE TO DETERMINE

4.1 The issue before me that I must determine is whether or not the termination of the Applicants on the ground of retrenchment was substantively and procedurally fair in terms of The Employment Act of 1980(as amended).

5. SUMMARY OF THE EVIDENCE

OPENING SUBMISSIONS FROM BOTH PARTIES

5.1 Mr. Simelane, the Applicants representative in his opening statement submitted that the Applicants were employed by the Respondent. That on the 30th November, 2007 the Applicants were dismissed by the Respondent on allegations of retrenchment. The Applicants aver that the act of terminating their services by the Respondent was grossly unreasonable and unfair procedurally and substantively.

5.2 The Applicants are challenging the substantive and procedural fairness of the retrenchment exercise by the Respondent.

5.3 The Respondents representative Mr. Justice Mavuso submitted in his opening statements, that the relevant procedure concerning retrenchment of Employees had been followed by the Respondent. Further that adequate consultations were held with the Applicants leading to their retrenchment.

5.4 He further submitted that the Respondent disputes having dismissed the Applicants, but admits having retrenched them lawfully. He stated that re-instatement of the Applicants was completely not in line with the overall purpose of the retrenchment which was conducted as a result of financial considerations, and thus it would be impractical to re-instate the Applicants.

5.5 He submitted that the contention of the Respondent was that the retrenchment was lawful in terms of The Employment Act,1980.

6. THE APPLICANTS CASE

TESTIMONY OF HEZEKIEL DLAMINI

6.1 The 1st Applicant testified under oath and stated that he was employed by Mr. Lighty Mabuza in March 2004, as an Artisan Aid. Further submitted that he was a shareholder until 2007 when he was

dismissed. It was his evidence that his dismissal was a result of Respondents Managing Director Mr. Mabuza informing them that the company no longer had money to pay their salary thus his dismissal.

He submitted that a meeting was called by Mr. Mabuza wherein he informed him together with all the other Employees that the company was no longer performing well as a result of forest fires that had occurred that year. This had resulted in the sale of several machines by the Respondent resulting in the loss of business and the company facing financial instability.

6.2 It was further submitted by the Applicant that letters advising them of the retrenchment were distributed by the Respondent, and the said letters were advising them that they would serve a months notice and that they would cease to work at the end of November 2007. The Applicant could not remember whether further meetings were held between the Employees and the Respondent.

6.3 Under cross-examination the 1st Applicant re affirmed that he was employed by Mr. Mabuza Respondent's Managing Director. It was further his evidence that he was a shareholder within the company, but that he was dismissed in November 2007. It was his evidence that he did not have a copy of the letter with him. Under cross-examination when it was put to him that the contents of the letter he received was a notification of a retrenchment and not a letter of dismissal, the Applicant submitted that he believed that he was dismissed, as the Respondent should have informed him if he intended retrenching him, which was not done.

6.4 When cross-examined on whether he understood the difference between a retrenchment and dismissal the response was to the affirmative. His contention was that he was not happy with the manner in which he was dismissed, him as he was a shareholder in the company. When it was further put to him under cross examination that his main contention about his retrenchment was that he was retrenched yet he was a shareholder, his evidence was that he was unhappy with his dismissal.

6.5 In the evidence further adduced by him, he averred that he was paid his terminal benefits after having approached the Department of Labour when the Respondent failed to pay him his benefits. It was his evidence that he did not request the Department of Labour to assist him in calculating the amounts due to him, nor check whether the package he eventually received was accurate. The reason adduced by him for his failure to seek clarity on the package he eventually received was that he was unaware he could seek clarity.

6.6 He was further questioned on whether the Department of Labour was advised of how much was paid to him as his terminal benefits, and questioned on his failure to ask questions at the Labour Department. His evidence was that the Department of Labour was aware of the benefits eventually paid to him, as they were present when the Respondent informed him of the terminal benefits to be paid to him.

6.7 During cross-examination it was the evidence of the Applicant that after receiving his benefits he resigned from Respondent. When put to him that dismissal, retrenchment and resigning were different processes, his response was that all he required now was the payment of his shares with the company, together with interest he had accumulated over the years. He stated that this amount was over E10, 000.00 and that this was the amount that he was now seeking the Respondent to pay him.

6.8 It is of note that the evidence of this witness was that he was seeking payment of his shares, the infusion of his shareholding status tended to confuse the issue that was in dispute, thus it became difficult to sift relevant information.

TESTIMONY OF NOMPHUMELELO GIYANE

6.9 The 2nd witness called was the above named, under oath she too testified that she was employed by the Respondent in 2004, as a Clerk earning a monthly salary of E2, 000.00. She testified that in November 2007 she was retrenched by the Respondent. Similar to the evidence of the 1st Applicant, she testified that the reason for her retrenchment by the Respondent was that the company was no longer making any money, as the machine used to generate income had been sold. She further testified that a meeting was held with the Respondent and all employees at Respondent's workshop in September 2007, wherein they were advised that the company was not doing well, however the reasons why the company wasn't doing well were not discussed with the Employees.

6.10 She testified that on the 11th October 2007 she received correspondence wherein she was advised that her services were being terminated. This letter was submitted as evidence by the 2nd Applicant and was marked "Annexure A".

6.11 She further gave evidence that attempts were made by her and the other Employees to discuss the matter with the Managing Director, to ascertain what criteria had been used by the Respondent when choosing those to be retrenched. They were advised by the Managing Director that he would advise the board on their demands and inform them of its response. This was done after the 22 October 2007, before they began to serve their notice, which began on the 1st November 2007 to the 30th of the same month. She testified that she served her notice and during that time no consultations were held between the Employees affected and the Employer.

6.12 A second document was submitted by the 2nd Applicant as part of her evidence, this letter was marked "Annexure B", and was entitled Memorandum of Agreement between Reeaps (Pty) Ltd and Retrenched Employees. This document specified amounts the retrenched Employees were paid. The document was signed on the 24th December 2007, in the presence of officials from the Department of Labour. It was signed by the Respondents Board Member, the Chairman and the Managing Director. The 3 Applicants and a 4th Mr. Million Mwelela had signed the agreement. Of note was that the 5th Employee Mr. Zweli Gamedze had not endorsed the document, no explanation was given by the 2nd Applicant in this regard.

6.13 When the 2nd Applicant was questioned on the involvement of the Labour Department, she gave evidence to the effect that on the 30th November 2007 they asked to see the Managing Director to question him on how and when their benefits would be paid. He responded by stating that the Board had not advised him to discuss the issue with the affected employees.

6.14 On hearing this, the decision was taken by the affected Employees to seek the intervention of the Labour Department. She testified that the Labour Department was called and an individual from the Department referred to as Welile was sent. Further consultation with Mr. P. Mavimbela from the Labour Department was done which led to an agreement being signed by the parties in Manzini.

6.15 She was further questioned by the representative as to why they had approached the Labour Department, she submitted that the reason they went to the Labour Department was to seek clarity as to how and what they should be paid.

6.16 She was further asked to give clarity as to whether the Respondent had consulted with them as to the department to be affected by the retrenched. She stated that they had not been told, and gave evidence to the effect that they were advised that all Employees would be affected. She further submitted that there were fourteen Employees within the company, four Employees were affected by the retrenchment, and the fifth Employee had reached retirement age.

6.17 Under cross-examination the 2nd Applicant was questioned on the nature of dispute lodged with CMAC, whether the nature of the dispute lodged by the Applicant was one of unfair dismissal, she responded to the affirmative. She was further questioned whether she had received a letter dismissing her, she submitted to the affirmative and stated that same was "Annexure A".

6.18 It was put to the Applicant that the letter she was referring to as a letter of dismissal was infact a letter notifying her of the retrenchments ,she responded by stating that she did not take it like that.

6.19 The Applicant was questioned on her understanding of the difference between retrenchment and dismissal and or whether she understood that these were distinct acts /procedures governed by different sections in the Employment Act. She stated that she would not know that. She affirmed again under oath that four employees had been retrenched by the Respondent

6.20 When it was put to her that where less than five employees are retrenched there is no need for the company to go to the Department of Labour, she stated that she was unaware of that. She submitted that they had proceeded to the Labour Department to seek advise on where, how and when their benefits would be paid. Further submitted that her benefits were paid by the Respondent and that she knew that payment of the benefits were for her retrenchment packages. She submitted that they lodged the dispute of unfair dismissal because she believes that Respondent did not retrench them fairly. She submitted that there were certain procedure the company failed to follow i.e. the Employer never consulted with them as Employees to be affected, they were not given an opportunity to look for work during the notice period, and they were not given an opportunity to give their own opinions and way forward. They only received letters advising them of their retrenchments, thus the conclusion that their retrenchment was unfair.

6.21 Further her submissions were to the effect that the Respondent had not indicated to them the criteria to be used during the retrenchment process. It was her evidence under cross examination that as a result of all those factures they believe as affected Employees that the retrenchment had been unfair.

TESTIMONY OF ABEL SITSEBE

6.22 The 3rd Applicant to give evidence was Mr. Abel Sitsebe. His evidence under oath was as follow, he was employed by the Respondent in 2004 as a fitter until the 30th day of November 2007 when he was retrenched. He stated that the reasons given for the retrenchments was that there were a number of forest fires that year and that the company was no longer making enough revenue. He submitted that prior to the notice he had not been told that he would be retrenched, he only got to know of it when he received the notice.

6.23 He submitted that they sought clarity from the Managing Director, but he informed them that it was not him who had taken the decision but the Board and that he would advise the Board that the Applicants were seeking clarity on certain issues and advise them of their response. This however never took place. It was his evidence that five employees were retrenched namely Million Mavelela, Zinhle Simelane, Abel Sitsebe, Hezekiel Dlamini and Nompumelelo Giyane. Further, he submitted that they contacted the Labour Department, as they were not convinced about the correctness of the payment they had been told they would receive. They testified that they sought the intervention of the Labour Department in December 2007, and that led to them receiving their cheques in payment of their retrenchment package.

6.24 Under cross -examination it was the evidence of the 3rd Applicant that their main concern was that the Respondent had not consulted them prior to the retrenchments. He submitted that the matter was only discussed after they had received their letters of retrenchment. His evidence was that they then approached the Labour Department who assisted in the calculation of their packages, and that is where they were advised to take the matter to CMAC. It was his evidence that only three of them lodged a dispute and the other two did not lodge same with them.

6.25 He further testified that the reason given for his retrenchment was that there was less work because of forest fires and sale of machinery by the company, thus revenue was low.

When he was questioned on why he had not gone to Respondent individually to seek clarity on his retrenchment, he stated that at the time he was confused and he had been retrenched as a group thus they raised their issues as a group. However, he testified that he sought clarity as an individual from his foreman Liziya Nxumalo.

6.26 What was confusing about Mr. Sitsebe evidence was that he would from time to time refer to four retrenched employees yet in his initial evidence he had advised that five employees were retrenched, and under re-examination Mr. Simelane who represented the Applicant did not seek Mr. Sitsebe to clarify on the issue.

7. THE RESPONDENTS CASE

TESTIMONY OF SIMON MABUZA.

7.1 The witness under oath introduced himself as the Managing Director of Respondent. He testified that in November 2007 certain Employees were retrenched namely Abel Sitsebe, Nompumelelo Giyane, Zweli Gamedze and Hezekiel Dlamini. He said, this was due to low revenue received by the company. This was due to the fact that the company had sold some of its heavy duty machinery, namely Bull Dozers and the outbreak of forest fires in Piggs Peak, where several forests had burnt down.

7.2 It was the evidence of the witness that as Managing Director of Respondent he was directed by Swaziland Railway to visit the site in Piggs Peak with one of its Employees to examine the impact of the damage to the forests. Upon his return from Piggs Peak he called all employees and informed them of the situation in Piggs Peak. He explained that in Piggs Peak, Swaziland Railways was owner of several machines that were maintained by the company. The company made its revenue by attending to the repair of the machine which worked 24 hours. Railway by then had sold their machinery, and Respondent no longer had much work to do and explained that there would be retrenchments. As Managing Director he realized that the garage section was in trouble and he approached the Board which told him to go to the Department of Labour to seek clarity on the retrenchment exercise.

7.3 Indeed he proceeded to Department of Labour, where they asked questioned him on the number of Employees to be affected and he advised them that 4 individuals were to be affected. He was advised of the terminal benefits he was required to pay the employees to be affected. After that he proceeded to write the letters to the Employees to be affected giving them notice of their retrenchment. It was upon receipt of those letters that the affected Employees sought assistance from the Department of Labour about the retrenchment. He was called by officials from the Department of Labour, wherein the issue of how, when and where the Employees terminal benefits were to be paid was discussed by the parties. It was his evidence that it was agreed that the Employer would be paid at the Department of Labour over a period of three months. However, the Respondent was able to pay the Applicants in two months. All the Employees affected were paid their benefits.

7.4 It was further Respondent's evidence that the Employees were further allowed to stay in Respondent's houses up until December 2007 in compliance with the law, and that according to Respondent's knowledge all the relevant procedures were followed by it.

7.5 Under cross-examination when he was questioned on the number of Employees affected by the retrenchment the witness stated that four employees were affected. He further submitted when asked on the number of individuals present at the meeting held with officials from the Department of Labour that he was present as well as the chairman Mr. Phillip Maseko and Caleb Dlamini. It was put to witness that the number of Employees affected by the retrenchments were five, he disagreed with this submission. When cross-examined on when he had told the employees of the retrenchments. He submitted that he could not remember the date but that it was in September 2008. The witness was vigorously cross-examined by Mr. Simelane but he was consistent in his submission that the employees were told before they received the notice of retrenchment that the company would be retrenching certain individuals.

7.6 The witness was further questioned on when he went to the Labour Department? He responded by stating that the 1st time he went to the Labour Department was in September 2007 before the retrenchment process, and again after the retrenchment process in November 2007. It was put to him by Mr. Simelane that the only meetings held between the company, Department of Labour and the Employees were held after the 30th November 2007.

Mr. Mabuza denied this and stated that several meetings were held between the company, Department of Labour and the employees affected by the retrenchment. It was his contention that the relevant procedures were followed when terminating the services of the Applicants. Further that the only reason the Department of Labour was involved was to assist in calculations of monies due to the Employees. The meetings were held between the parties, one at the Department of Labour and

another at Dvokolwako.

7.7 He re-iterated that a meeting was held with all Employees of Reeaps's company but didn't clarify whether same were done on an individual basis or as a group, but his evidence was that all Employees were told about the retrenchment exercise.

8. THE APPLICANTS CLOSING SUBMISSION

8.1 Applicant's Counsel in his closing submissions stated that the Respondent retrenched the Applicants after selling some of its heavy plant machinery and after forest fires in Piggs Peak. It was his submissions that the Applicants contention is that when retrenching them, Respondent should have followed procedure, which in their view the Respondent failed to follow. By following procedure the retrenchments would have been substantively and procedurally fair. He further submitted that failure on the part of the Respondent to consult the Applicant prior to the retrenchment exercise amounted to unfair procedure.

8.2 It was submitted by Mr. Simelane that the Respondent failed to follow the law when conducting the retrenchment exercise, as he failed to comply with section 40 of The Employment Act (as amended) 1980. He submitted that five employees were retrenched by the company, and as a result the company should have complied with Section 40. However Section 40 was not complied with and no consultations were held with the Applicants or their Union.

8.3 He further submitted that the Respondent did not indicate to the parties affected by the retrenchment, the selection criteria used to select employees who were eventually retrenched, and that such would have been discussed if consultations were held between the parties.

8.4 In support of their case the Applicant representative referred me to Section 40 of the Employment Act of 1980 (as amended). Reference was further made to the decided case of Swazi Observer vs. Hanson Ngwenya & 13 others Appeal Court Case No. 16/03 and the court Case of Esther Nxumalo vs. Federation of Swaziland Employers - High Court No. 108/02 as well as Workplace Law 2nd Edition Grogan Page 199, 191.

8.5 The Respondent in its closing submissions stated that the Applicants in the dispute had stated that the nature of dispute is of an unfair dismissal. Respondent further submitted that the Applicants all gave individual evidence and no witnesses were called by them to corroborate their evidence. Therefore the evidence of each Applicant should be recorded as is without supporting evidence.

8.6 It was submitted by the Respondent that the evidence of the 1st witness was that he was a shareholder in the company, and that he was fired because there was no money to pay salaries. Further when questioned on the relief he sought from CMAC he stated that he wanted the Respondent to pay him his money for the shares he held with the company as well as interest. It was Mr. Mavuso submission that the evidence adduced by the 1st witness was not in line with the dispute reported.

8.7 Further averred that the 2nd witness in his evidence in chief stated when asked whether the Respondent gave them a reason for the retrenchment. She responded "Yes" they said they had no money. The 3rd witness gave evidence to the same effect.

8.8 It was stated by the Respondent's representative that the Respondent had retrenched four Employees and the fifth one retired, which evidence Mr. Mavuso averred was corroboration by the witness. It was his submission that Respondent after informing its Employees of the retrenchments had no obligation to follow Section 40 of the Employment Act as only four Employees were to be affected by the retrenchment exercise and not five.

8.9 There was no union known to the Respondent representing the Applicants, so no consultations were held with the union but the Applicants were informed and notified of the retrenchment exercise. It was averred by the Respondent that for guidance, there being no collective agreement between themselves and the Applicants they had referred to statutory law in particular Section 40 of the Employment Act.

8.10 It was submitted by the Respondent that this section stipulates that when five or more individuals are retrenched then the company should notify the Labour Commissioner and giving no less than one months notice, provide audited statements but when less than 5 employees are retrenched then there is no need for the above.

8.11 In conclusion it was the Respondent's submission that it is the Applicants who bear the onus of proving that the Respondent acted contrary to the law having failed and or neglected on a balance of probability to discharge the onus that they bear. Further submitted that where an Employee complains of a retrenchment the prayer ought to be one of setting aside such a process.

9. ANALYSIS OF EVIDENCE

9.1 In the overall testimony the Applicant disputed the procedural and substantive fairness of their retrenchment. The Respondent denied that the retrenchment was procedurally and substantively unfair. I shall therefore look at the evidence based on a full and fair consideration of the entire evidence; I will go on to determine whether the retrenchment is fair or unfair within the Employment Act by examining the procedural and substantive aspect of the retrenchment. John Grogan in his book DISMISSAL loosely translated retrenchment as the termination of employment on the ground of superfluity of workers due to economic turndown.

9.2 It has also been referred to as dismissal based on Operational Requirements. Therefore there must be an objective link between the dismissal / retirement and some economic technological or similar need of the Employer. Retrenchment is therefore a dismissal on ground for Operational Requirement.

9.3 In order to show that the retrenchment was fair the Employer must prove that the preferred reason for the retrenchment is one based on the operational requirements of the business, thus proving that the retrenchments one falling within statutory law. Retrenchment in our law is dealt with in section 40 and section 36 of The Employment Act 1980(as amended),Section 36 reads;

It shall be fair for an Employer to terminate the services of an Employee for any of the following reasons.....

(j) because the Employee is redundant.

9.4 Section 40(2) of the same act which reads;

9.5 Where an employee contemplates terminating the services of 5 or more of his employees for reasons of redundancy, he shall give not less than one months notice thereof in writing to the Labour Department and to the Organization (if any) with which he is party to a collective agreement and such notice shall include the following:

- a) the number of employees likely to become redundant
- b) the occupation and remuneration of the employees affected;
- c) the reason for the redundancies;
- d) the date when the redundancies are likely to take effect;
- e) the latest financial statement and audited account of undertaking;
- f) what other options have been looked into to avert or minimize the redundancy.

9.6 It is the evidence of both parties that before the Employees were given notice of the retrenchment they were informed by the company's Managing Director that there was a possibility that the company would conduct a retrenchment exercise due to the economic down turn.

9.7 It was further averred by both parties that the Respondent was experiencing financial difficulties, after selling most of its heavy machinery. Another factor which had contributed was the burning down of forests in Piggs Peak where the Respondent obtains a substantial part of its income. So the reason why the Respondent was forced to retrench was not in issue.

9.8 The parties are not ad idem on whether there should have been consultations between the parties to be affected by the retrenchment before same took place. The bone of contention is whether or not

the Respondent followed the appropriate procedure when carrying out the retrenchment exercise.

9.9 Respondent avers that it informed all its Employees of the looming retrenchment exercise. The Applicants aver that indeed they were informed of the looming retrenchment however, the Respondent did not consult them prior to the retrenchment as individuals to be affected by the retrenchment nor did it consult with their Union.

9.10 Before we embark on an analysis of the evidence before me , it is imperative to state that in terms of section 42(2)(a) and section 42(2)(b) of The Employment Act which stipulates that in dismissal cases the Employer has the onus of proving on a balance of probabilities that;

- a) the termination was one permitted by section 36 of the Act;
- b) that it was fair and reasonable to terminate the employment in the circumstances.

9.11 In terms of the aforementioned provision, the Respondent herein bears the onus of proving on a balance of probabilities that it terminated the services of the Applicants due to Operational Requirements (redundancy) in terms of section 36(j). The Respondent is also obligated upon considering the circumstances of the case to show that in the circumstances the only reasonable remedy was to terminate the Applicants services.

9.12 Retrenched under our law in encompassed under the definition of redundant employee as stipulated in section 2 of The Employment Act which states that a; Redundant employee means an whose contract of employment has been terminated-

- a) because the Employer has ceased or intends to cease the business or activity in which the employee was employed; or
- b) because the Employer has ceased or intends to cease to carry on the business in or at the place in which the Employee was employed; or
- c) because of any of the following reasons connected with the operations of the business:
 - i) modernization, mechanization or any other change in the method of production which reduces the number of Employee
 - ii) the closure of any part or department of the business
 - iii) marketing or financial difficulties
 - iv) alteration in production or production methods necessitely different skills on the part of employers
 - v) lack of orders or shortages of materials
 - vi) scarcity of means of production
 - vii) contraction in volume of business.....

9.13 Having stated the above it is apparent from the evidence adduced by the Respondent that it relied on financial difficulties (Operational Requirements) as the reason for the intended termination of the Employees.

9.14 I will first deal with the substantive fairness of the Applicants dismissal. It is common cause that the Respondent was encountering financial difficulties. It is the evidence of all the Applicants under oath that they were aware that heavy machinery was sold by the Respondent due to financial difficulties. Further, they were aware that forests fires had broke out in Piggs Peak and had had an effect on the Respondent's revenue. The test for substantive fairness in dismissal for operational requirements as stated in **John Grogan**, Workplace Law, 9th edition, 2007, Juta Law, page 226 is "whether the dismissal was operationally rational"

9.15 From the evidence adduced it is obvious that the Respondent was facing financial difficulties and needed to reduce its spending as it was no longer conducting as much business as it use to and thus facing financial down turn. No evidence was adduced by the Applicant to refute this instead they acknowledged this fact.

9.16 It is for this reason that I am satisfied that the Respondent had a substantive reason to terminate the services of the Applicant.

9.17 The 2nd issue that I am now to deal with is the procedural fairness of the retrenchment. In the opening statement by the Applicant representative Mr. Simelane, stated that 5 Employees had been affected by the retrenchment thus Respondent was inclined to adhere to section 40 of The Employment Act. However the evidence given by the Applicants tended to contradict itself. Mr. Dlamini in his evidence did not state in his evidence how many Employees were affected by the retrenchment as the question was not posed to him.

9.18 The evidence of Mr. Sitsebe was that 5 employees had been retrenched namely, himself, Million Mawelela, Zwile Gamedze, Hezekiel Dlamini and Nompumelelo Giyane. The evidence of Nompumelelo was that 4 people had been affected by the retrenchment, and that the fifth had reached retirement age and had retired.

9.19 On the basis of the evidence adduced and the document submitted, I am made to believe that Zwile did not sign the settlement document because he was not part of the retrenchment and that his services had been terminated because he had reached retirement age.

9.20 No evidence was adduced by the Applicant as to why he had not signed the document. It is my conclusion that four employees were affected by the retrenchment, therefore the Respondent was not required to comply with section 40(2) of the Employment Act.

9.21 Having said that it is important to note that section 40 stipulates that the Labour Commissioner must be informed of a retrenchment where 5 or more employees are affected, the sections lists the items that should be provided to the Commissioner. However, this does not mean that employees shouldn't be consulted individually about a looming retrenchment.

9.22 It is my view that an employer must consult with Employees to be affected by a retrenchment individually and if there is a union to which the employees are affiliated, consultations should be held with the union. This is to inform the employees to be affected by the retrenchment of their retrenchment and the criteria used by the Employer.

9.23 The Courts have consistently held that the Employee is bound to consult about the selection criteria before terminating employees on grounds of redundancy. In the case of Thabo Simelane v J.D Group Swaziland Industrial Court Case No. 166/02, wherein Judge Nkonyane stated;

"the court is satisfied that the Respondent did serve the notice in order to comply with the requirements of section 40(2) of the Employment Act. That section however is couched in general terms. There are issues that will require consultation with the individual employee, which if not done the employee will be prejudiced."

9.24 This paragraph was used by the Judge President in his judgment in the case of Edith Nxumalo v The Federation of Swaziland Employers Industrial Court Case No.108/02 where he went on to state,

"I fully concur with the sentiments of the learned Judge. the same principle is applicable in this case as I have already held. It must be noted that in the present case there was no need of issuing the section 40 notice, because not more than 3 employees were targeted for retrenchment"

9.25 The Applicants did not give evidence to the effect that they were affiliated to a union at the time of the retrenchment. The only evidence given was that the union SMAWU wrote correspondence to the Respondent on the 6th November 2007. I am left to conclude that since there was no mention of a union prior to the exercise of a retrenchment, the Applicant joined the union after their dismissal.

9.26 Having stated the above and having made reference to decided cases, it is my view that the termination of the of the Applicants employment is one permitted by law in particular section 36 of the Employment Act as amended. Substantively the Respondent has proven that there was ground for it to terminate the Applicants services, the ground being financial difficulties thus the termination of the Applicants services was substantively fair. However, I am of the view that the Respondent did not follow fair procedure when terminating their services as it should have consulted the Employees to be affected individually. This was so they could inform the individuals of the criteria used to retrench them and why the company was forced to retrench. Even though the overall decision to retrench rests with

the Employer, it is my view that the Applicants should have been consulted, for the retrenchment to be seen to be fair.

10. CONCLUSION

10.1 Having come to this conclusion, I find that the retrenchment of the Applicants was procedurally unfair based on the fact that the Applicants were not consulted individually, as employees to be affected by the retrenchment. They were not informed that they would be the affected Employees. I further find that from the

11.2 Where a dismissal is procedurally unfair we are guided by section 16(4) of the Industrial Relations Act 2000 which states;

"if a dismissal is unfair only because the employer did not follow a fair procedure, compensation payable may be varied as the court deems just and equitable and be calculated at the employees rate of remuneration on date of dismissal."

11.3 Arbitrators are conferred with the power as stipulated in the above section. Taking into account the financial difficulties which resulted in the retrenchments of the Applicants by the Respondent, and there being no evidence adduced by the Applicants as to their present financial situation and employment status. The Respondent is ordered to pay compensation to each Applicant equivalent to two months salary. Nompumelelo Giyane claims payment of her terminal benefits in the Dispute Form, yet in her evidence she submits that same was paid, no evidence was given to the effect that she had not received payment of same, I am thus led to believe that she has since been paid same.

11.4 Payment shall be as follows;

Hezekiel Dlamini	E2, 600.00
Nomphumelelo Giyane	E4, 000.00
Abel Sistebe	E5, 000.00

11.5 There is no order as to costs

Payment of the aforesaid amounts should be paid by the Respondent within 30 days of receipt of same.

DATED AT MANZINI ON THIS THE 27th DAY OF APRIL 2009.

COMMISSIONER BANELE NGCAMPHALALA

(CMAC)ARBITRATOR