IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1398/92 & 404/93

In the matter between:

THEMBA MDLULI AND 7 OTHERS	Plaintiffs
JABULANI DLAMINI AND 67 OTHERS	Plaintiffs'
vs	
EMASWATI COAL (PTY) LTD	Defendants
CORAM:	S.W. Sapire A.C.J.
FOR PLAINTIFFS	Mr. A. Shabangu
FOR DEFENDANT	MR. P. Flynn

Judgment

(8/5/96)

Two cases arising out of the same circumstances were heard together. The protagonists are a number of employees or former employees of Emaswati Coal (the plaintiffs) and Emaswati Coal (the defendant).

It was agreed between the parties that I was to assume that the relative facts were common to all the plaintiffs and that I was to determine whether the defendant was liable to the plaintiffs at all in which case disputes as to the amounts of the claims would thereafter be resolved by the parties. If I should find, so it was agreed, that there was no liability on the part of the defendant to the plaintiff, there would be either judgment for the defendant or I would grant absolution from the instance depending on my findings.

The defendant I was informed is in liquidation, not because of anything relevant to this dispute, and that the case was to proceed as if the defendant was properly cited. Mr. Flynn announced that his instructing attorney was in fact acting for the liquidator who had agreed to this procedure notwithstanding that the defendant was technically not properly cited.

The defendant so represented was in fact the liquidator.

The summonses allege that the plaintiffs were all engaged by the defendant on identical terms recorded in written agreements in accordance with the provisions of Section 22 of the Employment Act 1980 (which I refer to as the ACT). A specimen of the form used was attached at the summons of significance to the plaintiffs' claims is the provision appearing in the specimen form reading as follows;

"Notice employee entitled to receive as per employment act."

The words "as per employment act" are in a manuscript whereas the rest of the sentence is part of the form in type. Having regard to Section 33(2) of the Act which reads:

"Notwithstanding any other provision of this section, where an employee has completed his probationary period of employment and is employed on a contract of employment which provides for him to be paid his wages at monthly or fortnightly intervals, the minimum period of notice of termination of employment to be given to that employee shall be not less than one month or a fortnight as the the case may be."

As I am to assume that the facts in each case of each plaintiff are the same. Each of them was to be paid monthly and all had completed their probationary periods. It follows that the contracts of each of them was terminable on one month's notice.

Although Mr. Shabsngu argued that a further term of the contract indicated that the company policy with regard to retirement (was) "at the age of 55 years'1 somehow contradicted the notice period provision, and that the contract was to be read as enduring to at least the

stated retirement age. I can see no force in this argument. It is contrary to every recognised cannon of construction and in particular requires the complete disregard for the ordinary plain meaning of the language. It follows that the allegation in the summons that each of the contracts was to terminate when each of the plaintiffs reached the age of fifty five years is not correct or supported by a proper reading of the contract. What the contract does say is that the contracts were terminable on one month's notice, and if not so terminated before such tine, the employees would normally retire at the specified age.

The basis of the plaintiff's claims is alleged in paragraph 7 of the summonses, that is on 12th January 1991, the defendant represented by its General Manager J.P. Daly and by letter of which a specimen was attached to the summonses as annexure D "prevented the plaintiffs from entering its premises for the purpose of carrying out their duties under the employment contracts".

The defendant in its plea admits that a meeting with workers including the plaintiffs on the 12th January 1991, the workers were orally informed of management's decision and the contents of the letter and copies of the letter were circulated to all present and made available. To facilitate analysis of the letter, it is necessary to quote it in full.

"NOTICE TO THE EMPLOYEES AT EMASWATI COAL 12 January 1991

"Thank you for attending this meeting. Management end the Directors are concerned about the safety of employees both underground and on surface.

Under the present circumstances of threats and intimidation it is not possible for officials to properly perform their duties of ensuring the safety of workers.

The discipline or. the mine has broken down and safety instructions are being ignored.

Employees are not using the grievance procedure to bring matters of concern in respect of safety to managements' attention but are acting in a unilateral manner.

Managements' relationship with the Union has broken down following the Union's withdrawal from involvement in the recent dispute. Without a Union, or properly elected employee representatives, Management cannot hold proper discussions and negotiations with the work force on matters of

importance such as safety.

Finally, the fact that the mine is not working normally, but is involved in a slow strike, is itself dangerous because workers minds are not on the job but are focused on the outcome of the dispute.

Management is looking to each employee to agree individually that they will:

1) Work normally and in accordance with the laid down procedures and standards of Emaswati Coal.
2) Abide by the disciplinary and grievance procedures which have been agreed between management and the Union.
3) Abide by the recognition agreement which was agreed between management and the work force.
4) Accept that if they break this understanding they may be dismissed in accordance with the disciplinary procedures.

   Management has decided that, due to the unsafe conditions at the mine, operations will be suspended with immediate effect.

There will therefore be no work at the mine today and work will not resume unless employees are prepared to sign the undertakings which I described.

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Employees can collect pay owing to them up to today on Monday After today there will be no pay until work starts again.

If employees would like more information on this, I am available to talk with individual employees or their representatives at any time.

Any employee who wants to sign the agreement to work normally and to abide by the agreed procedures car. contact roe or any member of the management team. Any employee who signs this agreement will be allocated work in a safe area and will be paid normally from the date on which they sign the agreement

Thank you."

The plaintiffs contend that the letter and the action taken by the defendant as outlined in terms thereof amounts to an illegal lock out action that persisted until the company went into liquidation. The defendant on the other hand contends that the closure of the mine was , justified and that the manager was acting within his rights and obligations having regard to the provisions of the Mines and Quarries Machinery & Safety Regulations 1969.

The interpretation by the plaintiffs of the events leading up to the meeting on the 12th January 1991 and the effect of the letter which was distributed has not always been unequivocal and in this connection, reference should be heard to the affidavit of Jabulani Dlamini which as attested in previous proceedings but which was introduced as an exhibit in the present case.

On the reading of this affidavit I observed that the plaintiffs have sought to view the defendant's action both as a lock out and a repudiation of the employees contracts A lock out as defined in the Industrial Relations Act 1980 of necessity implies a continuation of the contract and the prevention of the workers from working in terms of the contract.

The plaintiffs have in effect given evidence in the alternative in Jabulani Dlamini's affidavit and either the defendant's action was a

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lock out or a termination of the plaintiffs' contracts. It cannot be both at the same time.

The reason given for the closure of the mine attributed to the General Manager does not accord with What was stated in the letter, I also find that the undertaking required of the plaintiffs was nothing more than that required of them under their ordinary contracts.

The letter clearly informs the employees to whom it was addressed that the mine was closing because of safety considerations brought about by the persistent unrest on the mine. Mention is made of the undeniable facts that disciplinary and grievance procedures agreed between management and the work force were being ignored and that the recognition agreement was being disregarded. The Union to which most if not all the plaintiffs belonged had distanced itself from the dispute and the manager had no way of engaging in collective bargaining in the manner envisaged and provided for in the recognition agreement.

Read in the context of other documents which were proved in evidence, the letter does not constitute a lock out. In a letter dated 12 January 1991 the General Manager Mr. Daly, informed the Government Mining Engineer of the action taken involving the temporary suspension of operations at the mine. The reason for this step was the inability of management to adequately provide for the safety of its employees, on account of the continued labour unrest at the mine. Clearly what was being referred to was the continued confrontational attitude of the work force and its refusal to have the Schroeder affair dealt with by the agreed grievance procedures.

The Commissioner of Mines wrote to the defendant on the 16th January 1991 apparently by then not having received the defendant's letter of the 12th. The Commissioner drew attention to a notice which appeared in the press announcing the temporary suspension of the operations at the mine and demanded a full letter of explanation outlining the events leading up to the closure.

In response a second letter was sent by Daly to the Commissioner of Mines in which the reasons and authority for the suspension were

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given. The letter made reference to a number of applicable regulations which made management responsible for safety at the mine and required the manager to act as he did. It is not necessary to find as a fact that the officials had been forced from underground or that the plaintiffs had each of them participated in the rampage which resulted in damage to mine property. The fact is that credible reports had been made to Daly regarding conditions on the mine and upon these reports he acted. He was not seriously challenged on the basis that he acted male fide in suspending operations. On the probabilities the suspension in itself did not amount to either to a termination or repudiation of the defendant's several contracts with the plaintiffs or to a lock out. But the matter does not end there, for the letter goes on to advise the labour force that unless and until each of the employees gave the undertaking required of them by signature of the letter copies of which were available at the meeting on 12th January, the contracts would no longer be in force and that such employees would not resume their employment after the stipulated date.

The original date stipulated was later extended but in principle the matter remains the same. Those employees on the other hand who gave the undertaking would on so doing immediately restart work on safe areas of the mine.

The plaintiffs are these who found something sinister in the undertaking. I cannot see how they would have been prejudiced by doing what was required of them. The defendant's management having regard to the conditions of the mine were perhaps not unreasonable in requiring some assurance that its employees would desist from the irregular steps taken to air their grievances. The employees however may have viewed signing the letter of undertaking as in some way backing down on their demands regarding the Schroeder affair. It must be remembered that the defendants had not immediately reacted to the unrest or the various items of unrest to which it referred to in its plea. The defendant did not immediately react in this way to the officials being forced away from their duties underground, nor did they react immediately to the violence which caused damage to the company property. Nor even did they act immediately on the go slow

which had persisted since as early as October. It may be significant that the meeting of the 12th January and the letter issued there at followed shortly on the outcome of the commission of enquiry. It is surprising and a matter of adverse comment that management closed the mine only on the 12th December after the alleged dangerous conditions which prompted the closure had obtained for some five or six weeks at least.

The correct interpretation of the circular' letter of the 12th January issued at the meeting, is that it is firstly an intimation to the employees of management's decision to close the mine for safety reasons and secondly, to give conditional notice of termination of employment to those employees who refused to sign the undertaking.

The employees were entitled to one month's notice of termination. The notice given in the letter has fallen short of this. The employees were not summarily dismissed as alleged by the defendant for grave breaches of their contracts as defined in Section 36 of the Employment Act. I am fortified in this view as it is only those plaintiffs to refused to give the written undertaking who were to have their contracts terminated. From this it can be inferred that the sole reason for terminating the contracts was refusal to comply with the conditions that the letter of undertaking was to be signed by a particular day. Prior misconduct was not the criterion of or ground upon which termination was to take place.

I now turn to examine plaintiffs' claims and the defendart's plea (as amended).

1. I cannot on the evidence find that the plaintiff Majunzile Ndwandwa has been proved to be an employee of the defendant. In so far as. his claims are concerned, there will have to be in absolution from the instance with costs.

2. I make no finding as to the correct rates of pay of the plaintiffs as this was not an issue at this stage of the suit.

3. The allegations in paragraph 7.2 of the plea have not been proved. There has been no evidence as to which if any of the plaintiffs

took control of the mine and prevented the defendant's management supervisors and safety officers from going underground to supervise the work. There has been evidence of reports made to management Which are sufficient to explain and justify the belief that safety was being jeopardised and thus the temporary closure. The officials who were actually threatened were not called and no direct evidence of what happened underground at the coal face was given. Nor was there any direct

evidence as what was meant by-go slow or who had participated therein. And as I pointed out earlier in any event, the facts alleged in this paragraph were not the immediate ground for the termination of the plaintiffs' employment.

4. The same applies to the allegations in paragraph 9.2,

5. It is true as pleaded in paragraph 10.2 that the defendant did not repudiate the plaintiffs's contracts. The defendant infact terminated the contracts on notice. Such notice was however insufficient and the plaintiffs should have been paid in full for all periods up to the end of February 1991.

6. The events alleged in paragraph 10 all I find are of historical interest only.

7. The allegation in the plea in paragraph 105 that the "plaintiffs' services were lawfully terminated on the 1st February 1991 for reasons permitted in terms of Section 36 of the Employment Act 1980" has not been established on the evidence. On the analysis of the effect of the letter of 12th January which I have made, it is clear that the contracts were terminated on conditional notice. Irrespective of what any particular employee had done in breach of his contract, he could have avoided dismissal by signing the letter of undertaking. It follows that the reason for dismissal was the failure to give the undertaking within the extended period allowed.

8. The plaintiffs are in the circumstances of their dismissal entitled to the severances allowances provided for in Section 34.

9. The plaintiffs are not entitled to payment of any amounts in respect of period after 28th February 1991.

Those are my findings and as I find that there is liability on part of the defendant on at least some of the claims.

S.W. SAPIRE

ACTING CHIEF JUSTICE