

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 191/2000

In the matter between:

JOANNA LOPES

APPLICANT

and

LEITES MOTORS LIMITED

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR APPLICANT:

S.SIBANDZE

FOR RESPONDENT:

Z. JELE

JUDGEMENT

02/07/02

The Applicant in this matter was employed by the Respondent Leites Toyota, Mbabane as a customer relations officer on the 6th February 1995 and was in continuous employ of the respondent until the 10th February 1999. Though the description of the Respondent was queried in the Respondent's reply, it was not made an issue during the trial.

It is common cause that the Applicant's position was declared redundant and she was informed accordingly on the 10th February, 1999 that she would be retrenched with effect from the 31st March, 1999.

It is not in dispute that upon being informed of the Respondent's decision, the Applicant chose not to serve the notice up to the 31st March 1999 but opted to leave the employ immediately.

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The Applicant was unhappy with the decision of the Applicant for the alleged reasons that the Respondent did not consult with her regarding the retrenchment prior to the notification, that the Respondent did not make efforts to avoid the retrenchment or to obviate its effects on the Applicant and that the retrenchment was done in bad faith and same was contrived to justify an unfair termination with the sole intention of hiring her replacement which she contends happened.

To justify her contention of the malafide conduct by the Respondent, Applicant recounted that at the material time she was at home on sick leave and while there, the respondent sent a doctor to her with a request that he obtained a blood sample to test her Aids status. She added that she was targeted for retrenchment because the Respondent thought that she had contracted Aids but not for any alleged economic difficulties.

This allegation was said by the Respondent to be spurious and figment of Applicant's imagination as it was not conduct consistent with company policy and had never happened to any other employee.

It is common cause the Respondent had conducted a retrenchment exercise of about eight employees due to the shortage of work in the body workshop from January 1998, when the Central Transport Administration (CTA) of Swaziland Government withdrew its work from Respondent's workshop without any notice. The withdrawn work accounted for 50% of the monthly labour turnover leading to the redundancy of the identified positions.

A statement of accounts between January 1998 and September 1998 reflected a decline of total value of workshop labour sales from E276,551 in January 1998 to E158,465 in September 1998.

The Applicant was not in a position to challenge the figures presented by the Respondent but insisted that she was not identified in the initial list that was sent to the Commissioner of Labour as one of the persons targeted for retrenchment and that she was the only person outside the body workshop department to be retrenched. This added to her suspicion that she was not identified for retrenchment for the economic reasons aforesaid, but due to her health conditions.

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She further told the court that she was not the last person to be employed in her department yet employees like Busisiwe Nkambule who had commenced work in 1998 was not targeted for retrenchment. She was given a month sick leave from 19th July. Upon expiry of the leave, she reported back to work but her manager Mr. Marais sent her back home stating that she was not fit to resume work. It was then that a doctor was sent to her with a request to obtain a sample for an Aids test. She was however charged for the Doctor's consultation fee.

Dissatisfied with the termination, she reported the dispute to the Commissioner of Labour who was unable to resolve it and a certificate of unresolved dispute was issued.

She now seeks maximum compensation for unfair dismissal and notice pay. She told the court that she was 31 years old and married but had no children. She found an alternative job after eight months. At the time of dismissal she was earning E1,900.00 per month.

She admitted under cross examination that she received two months salary in lieu of notice, was paid in lieu of leave days owed, additional notice and severance allowance.

She conceded that she was aware that the Central Transport Administration had withdrawn its business from the Respondent leading to a fifty percent (50%) decline in the turn over of the body shop. She was agreeable that it was reasonable to reduce the work force in the circumstances but being the only employee in the customer relations department she believed that she was unfairly targeted for retrenchment. She told the court that she was not aware if any one was employed in the department to replace her contrary to her contention in paragraph 6.3 of the Particulars of Claim that the Respondent hired someone else in her position.

The Respondent called Mr. Alastir Lyle to testify in support of its case. He was the Managing Director of the Respondent for 23 years and knew the Applicant. He explained that the Applicant was retrenched in 1998 as a result of a downturn in the bodyshop business after the government of Swaziland had withdrawn its business from the company.

As a result there was a need to trim the staff who in the main comprised mechanics and their assistants.

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The labour department was notified of the development and the decision by management.

Before a decision was taken, a firm of Auditor styled KPMG was contracted to study the situation and advise. A report was submitted by the firm, showing that between January and September 1998, turnover

had declined from E276,551 in January to E158,465 in September.

As concerns the Applicant's position, though it was not initially marked for redundancy, it was decided that a customer relations officer was no longer viable in the circumstances of the Respondent. The matter was discussed with her by her immediate supervisor Mr. Marais. She was given notice and was retrenched. She opted not to serve the notice but was paid two months salary in lieu of notice and terminal benefits. The witness conceded that he was not privy to the discussion between Mr. Marais and the Applicant though he had subsequently received a report from Mr. Marais. Mr. Marais was no longer working for the Respondent and was not in Swaziland.

He denied that the Applicant was retrenched due to her sickness and told the court that that was contrary to company policy. He denied also that anybody was hired to take her place. Existing staff fitted into her functions.

Section 42 (2) (a) states that the services of an employee should not be considered as having been fairly terminated unless the employer proves that the reason for the termination was one permitted by Section 36.

Section 36 (j) provides that it shall be fair for an employer to terminate the services of an employee because the employee is redundant.

Redundant employee is defined in Section 2 of the same Act to include an employee whose contract of employment has been terminated because of 'marketing or financial difficulties', 'lack of orders or shortage of materials' and 'contraction in the volume of business'.

The Respondent has clearly demonstrated that between the months of January and September, 1998 its volume of business, especially from CTA had drastically contracted, necessitating reduction of its staff.

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For retrenchment to be valid, it must be substantially fair and just towards the employees affected. As was stated in South African cases of *Atlantis Diesel Engineers (Pty) Ltd v NUMSA* 1994 ILJ 1247 (A) and: *S Forza v Lekato Vet AG Ltd* 1994 ILJ 408 (IC) U the employer is entitled to decide in principle to retrench employees but not to finalize and execute the decision without consulting the trade union or employees involved.

The court is satisfied that the decision to retrench was fairly made and that upon resuming work from the sick leave, the Applicant was properly consulted and informed of the decision to retrench her. She was given adequate notice to prepare to exit the employment but she had opted to leave immediately. She was however paid two months in lieu of notice and was paid all the statutory money due to her.

The court is further satisfied that her position of customer relations was not vital to the operations of the Respondents due to the financial difficulties at the time and that it was fair and just in terms of Section 42 (2) (b) to terminate her services taking all the circumstances of the case into account, including the reason for the termination, the position she held and non availability of alternative positions to be redeployed to.

The court is satisfied that the decision was not influenced by her sickly status.

In the result, the Application must fail in its entirety. There will be no order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

