

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 204/2000

In the matter between:

ARTHUR MNDAWE AND 78 OTHERS

APPLICANTS

and

CENTRAL BANK OF SWAZILAND

RESPONDENT

CORAM

KENNETH P. NKAMBULE

: JUDGE

DAN MANGO

: MEMBER

GILBERT NDZINISA

: MEMBER

FOR APPLICANT

: MR. A. SHABANGU

FOR RESPONDENT

: MR. Z.D. JELE

JUDGEMENT

26/3/07

In this application the applicants seek the following relief:

- a) Reinstatement and/ or
- b) Maximum compensation for unfair dismissal.

The contention by the applicants in their particulars of claim is that their services had been unlawfully terminated by the respondent. The grounds for unlawful termination are set out at paragraph 6 of the particulars of claim as follows:

(6) On or about 30th April 1994, the respondent dismissed the applicants from their employment and such dismissal amounted to unfair termination because inter alia the following reasons:

6 (1) The reason given for the dismissal is not a fair reason within the contemplation of Section 36 of the Employment Act of 1980 as amended.

6 (2) The respondent apparently gave the applicant a right to elect to go on voluntary retrenchment when in reality such a right to consent did not exist having regard to the time within

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which the applicants were supposed to have made an election.

6 (3) The respondent threatened that the applicants were going to suffer some disadvantage if they did not sign the document which was Annexure 'B' herein, in that they were going to lose an incentive package which the bank was offering to pay them contrary to Section 71 of the Industrial Relations Act applicable at the time.

6 (4) The selection criteria was not disclosed to us, was not agreed with the union and had no rational basis.

6 (5) The respondent hired a number of employees not very long after the dismissal of the applicants indicating that no alternative measures other than the termination of the applicants' services were fully investigated by the respondent.

6 (6) The bank fraudulently misrepresented to each of the applicants that there would be additional incentives paid to each one of them if they signed Annexure 'B' within seven days from the date they were served with letters and as such misrepresentation having turned out to be false all the applicants acted trusting in the truth of the promise to their prejudice because to date none of them received any additional incentive from the bank.

In its reply the respondent deny that the applicants had been unfairly dismissed, they contend that some of the applicants applied for and were granted a voluntary exit, those that did not apply and their position having been identified in terms of the restructuring exercise, were retrenched ten (10) months later.

According to the respondent the period afforded to employees to make an election was initially seven working days (which in fact was fourteen (14) calendar days). This was from the 31st day of March 1994 to 14th April 1994. this period upon request by the Union on behalf of the employees, was extended to a further fourteen working days. Thereafter there was no further request for the extension of time.

Respondent further contend that the Voluntary Exit Scheme Criteria and procedures for redundancies were negotiated and agreed to with the Swaziland Union of Financial Institutions and Allied Workers.

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Respondent further contend that the applicants were paid all their dues. They received a payment in full and Final settlement of all claims against the bank as evidenced by Annexure 'CD 1' and as such no further claim lay against the respondent.

Mr. Arthur M, Mndawe gave evidence under oath. He said he was employed by the respondent in 1986 as a purchasing clerk. His services were terminated on April 1994. according to Mr. Mndawe he was retrenched following a meeting with the respondent's governor, Mr, James Nxumalo. The governor, told the staff that there would be a retrenchment exercise. The meeting took place in December 1993. The governor stated that some departments would be closed.

This witness in cross-examination was asked whether there was a union in the undertaking. In response he said there was a union and that at some point in time he was a shop steward. He further stated that he knew that the union had a recognition agreement with the bank and as a result of the agreement the union had to consult with the bank on certain things and one of the issues that the union had a right to negotiate was the issue of redundancies.

Applicant's witness No. 2 Siphon Christopher Mthethwa told the court that he was employed by the respondent until 1994 when his services were terminated. He told the court that in 1993 there were a series of meetings that he did not attend because of time constraints due to work related commitments.

He decided to go to the Human resources manager for briefing. The Human resources manager confirmed what had been discussed in the meeting. According to this witness the human resources manager told him that there would be additional incentives to those who would take the Voluntary Exit Scheme. The incentives would range from E50,000-to E100,000- depending on the position and the time spent at the job.

According to this witness the human resources manager further stated that if one was not among names specified for the Voluntary Exit Scheme he could write and apply to human resources manager if he so wished to be considered for Voluntary Exit.

This witness told the court that he then applied to be included in the Voluntary Exit Scheme. He said the sole reason why he applied was because of the additional incentives. The application was accepted by the human resources manager Mr. J. E. Dlamini. He however, did not receive any additional incentive on termination of his services.

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Applicant witness No. 3 Mr, Gideon Sikhondze told the court that he left the respondent's employ on 31st April 1994 after receiving a letter which stated that due to the fact that a number of posts in his department were found surplus by the consultant report on restructuring, the bank was offering him the option of taking Voluntary separation with full terminal benefits calculated on the basis of the Collective Agreement plus other additional incentive.

The offer of additional incentives, according to AW3 was conditional. The condition was that within seven (7) working days of receipt of the letters he would indicate his decision whether he was taking the Voluntary Exit or not.

According to AW 3 he decided to take the Voluntary Exit package and signed the acceptance letter. This witness told the court that he signed the letter and accepted the package. He however, stated that the deadline was too close he did not have enough time to think and consider the offer.

Joseph K. Gama told the court that on receipt of the letter giving him seven (7) working days to accept a voluntary retrenchment package he opted not to sign and accept. According to this witness he was eventually told to leave the employ of respondent.

Respondent witness No. 1 Mr. J.E. Dlamini told the court that he was employed by the respondent in 1993 as human resources manager, and because of his capacity as human resources manager he played a role in this case.

According to this witness the bank commissioned a restructuring exercise in 1992. the main area of concern was to identify the core function of the organisation and to ensure that the organizational structures of the bank were addressed together with staffing levels; to determine and to award grades based on job content and to ensure that every staff member employed by the bank was fully utilised.

Mr. Dlamini told the court that Lwati Training Institute was commissioned to do the job. When Lwati took over a committee was formed comprising of heads of departments, the human resources division and two Union representatives. The committee was chaired by a member of Lwati Consultants.

According to Mr. Dlamini there was a number of reports which were finally produced by the consultants as a result. Mr. Dlamini said the consultants identified a number of problems existing at the time. The major ones were that there was overstaffing in a number of none core

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functions supporting staff. This was as a result of duplication of functions. Secondly the report identified affected departments. Some departments were not necessary for the running of the organization.

Mr. Dlamini told the court that after the exercise the consultants identified 113 surplus posts. The positive side was that 23 new posts were created. This was because the consultants discovered that some core - functions were understaffed.

After the report there was a specific meeting with the Union. Thereafter there was a meeting of the staff with management. According to Mr. Dlamini the governor of the Central Bank told the staff that all those who would be affected by the restructuring would be paid their benefits as required by law.

Following the acceptance of the report by both the respondent and the Union representing all employees, the respondent then issued a formal notice to the Labour Department (commission) and to the Union in terms of Section 40 of the Employment Act.

According to Mr. Dlamini, in order to minimize the number of persons who would lose their employment the bank and the Union agreed on the following:

a) There would be a transfer of suitably qualified staff from those positions identified in the restructuring report as being surplus to the requirements of the bank, to other positions in the bank (i.e. positions that were vacant and/or positions that were created by virtue of the same report).

b) There would be introduced a Voluntary Exit Scheme in terms of which employees who wanted to leave the bank's employ voluntarily could proceed and do so. In this regard vacancies would be created which could be filled by the employees whose positions were identified as being surplus to the bank's requirement.

c) An agreement was reached between the respondents and the union that the employees who wanted to proceed on a voluntary exit scheme would be paid the following;

- i) Notice pay
- ii) Additional notice pay
- iii) Additional incentive equivalent to one months salary
- iv) Leave pay

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v) Full pension pay into which the respondent had to make good a shortfall of 2.606 millions to the pension fund.

d) The parties (i.e. the Union and the respondent) further agreed that the employees would be paid a severance pay in terms of Article 4 of the Collective Agreement concluded between the parties.

In this regard the Union contended that the employees were entitled to both this amount and to statutory severance (i.e. in terms of Section 34 of the Employment Act).

The bank did not agree and a dispute arose. The dispute was reported to the Department of Labour. The parties agreed that the other benefits be paid to them.

According to Mr. Dlamini letters making an offer of the voluntary separation package were issued on the 31st March 1994, giving employees seven (7) working days to accept the offer. The offer was open to all employees, but specific letters were sent to those whose departments had been identified in terms of the restructuring report.

Regarding the severance pay the parties agreed to approach an arbitrator. The decision reached by the arbitrator in this regard is final. This court has no authority to interfere with it.

For retrenchment to be valid, it must be substantially fair and just towards the employees affected. This position was stated in South African cases of ATLANTIS DIESEL ENGINEERS (PTY) LTD V NUMSA 1994 ILJ 1247 and: S. FORZA V LEKATO VET AG LTD 1994 ILJ 408 (IC) U. In these cases it was held that the employer is entitled to retrench employees but not to finalise and execute the decision without consulting the Trade Union or employees involved.

The court is satisfied from the evidence that the decision to retrench was fairly made. This was after a

comprehensive study carried out by both the respondent and the Union. After the study there were consultations with management and staff as well as with the Union.

The report which was made by a consultant in conjunction with the members of the Union and management was adopted and implemented.

The court is further satisfied that the respondent did all that was in its power to mitigate the retrenchments.

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It is clear from the evidence of Winnie Magagula, John Mazibuko and J.E. Dlamini that the additional incentives which were eventually received by the applicants were pointed out before the employees accepted their packages. The Union did not challenge the issue of additional incentive because it did not arise as a problem in negotiations. All the witnesses have told us that they contacted the Union after the offer was made and they told the court that the Union advised them to accept the retrenchment offer.

From the foregoing it is clear that in arriving at the decision the respondent followed all provisions of Section 40 of the Employment Act. The application accordingly fails.
No order as to costs. Members agree.

KENNETH P. NKAMBULE

JUDGE - INDUSTRIAL COURT

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