IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 24/98

In the matter between:

BRIAN MATSEBULA APPLICANT

And

SHISELWENI FORESTRY COMPANY LTD RESPONDENT

CORAM:

NDERI NDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR THE APPLICANT : MR. A. SHABANGU

FOR THE RESPONDENT : MR. M. SIBANDZE

JUDGEMENT (15. 04. 99)

The Applicant alleges he was unfairly dismissed by the Respondent company on the 25th April, 1996 by a letter dated 22nd March, 1996. He contends he had served the Respondent company firstly as a Fire tower Induna, then was promoted to Shift Supervisor on the 26th March, 1991 though the Respondent failed to comply with all the conditions attached to the new post as a Supervisor in spite of several demands and grievances lodged by the Applicant. The conditions alleged were contained in an advertisement placed in the Times of Swaziland dated the 15th March, 1991,

The Applicant testified on oath as "AW1" and said that he duly applied for this post in a letter annexed to the application as annexure "B" dated 20th March, 1991. He further contended that he was interviewed for that post by the then General Manager of the Respondent MR. LUPTON who duly recruited him to the new post on promotion with all the terms and conditions of service as contained in the said advertisement which included an annual salary of between E6,000.00 to E9,750.00, monthly production bonus, 13th cheque, free housing, free medical treatment, group life assurance, and membership to a pension scheme.

The Respondent through the evidence of DW1 MR. RUDOLF HOHLS who was then working for the Respondent as its Financial Manager stated that he was part of the

management team that had decided to place the advertisement Annexure "A" to the application and that no one was interviewed for the advertised post of a Shift Supervisor since management had decided to down grade the position into two, so that instead of employing one senior Shift Supervisor at the mill they would employ two people. They filled the two posts by promoting BRIAN MATSEBULA and one FREDDIE THRING to the Oil Mill as Shift Supervisors. He insisted that MR. LUPTON did not interview the Applicant as alleged and that it would have been unprocedural for the General Manager to conduct the interview alone with the Applicant because he himself was always involved in short listing candidates for all positions from the level of supervisors and above and he would then submit the short list to the management for a final decision. He insisted this did not happen in this case.

MR. HOHLS even went further to dispute that the Applicant ever held a position of Induna stating that he was a labourer on a shift basis at the Fire tower.

The Applicant however produced exhibit "B12" which shows that he was appointed as a Field Induna

on grade "B1" on 9th August, 1989 at the Fire tower. He further produced exhibit "B3" a document entitled "SHISELWENI forestry Company Ltd visit of Sir Peter and Lady Leslie" dated 17th January, 1993 wherein it is shown that the Applicant BRIAN MATSEBULA was employed as Shift Supervisor at the Eucalyptus Oil Mill and a further document marked exhibit "B4" entitled "Oil Mill Labour Establishment" dated January, 1993 wherein the Applicant is indicated to have been on grade B3 as a Shift Supervisor with a future plan to deploy him as a senior supervisor.

In the light of this evidence, the contention by MR. HOHLS that the Applicant could not have been employed by MR. LUPTON as a supervisor since he was a mere labourer with no aptitude to rise to supervisory position does not appear to us to be credible.

This not withstanding the Applicant's Attorney in his opening address submitted that the Applicant had abandoned the claim for underpayments in respect of the alleged promotion. Indeed the Applicant's application does not include a claim for under payments, consequently the only relevance left of this employment history, is in respect of the contention by the Applicant that he was eventually declared redundant unfairly on 22nd March, 1996 as a calculated ploy by management to get rid of him for his continued insistence that he be paid all the underpayments in respect of the promotion he had been awarded on 26 March, 1991. He claims not only maximum compensation for unfair dismissal in terms of Section 15 of the Act but claims also special damages for victimisation in terms of Section 85 (3) of the Act.

The question we are called upon to decide is whether the Applicant was unfairly selected for retrenchment for reasons he has given this court on oath.

Annexure "SFC1" to the Respondent's reply dated 23 March, 1991 is a letter addressed to the Applicant by MR. T.G. LUPTON, the General Manager, which letter advised the Applicant that Ms application for the advertised post of "Shift Supervisor" was not successful for two reasons; that the company had since decided to have the oil mill operate one shift instead of two shifts as had been the case previously and secondly Applicant had no requisite experience for the job advertised. Most interestingly, however the General Manager proceeds in the second paragraph of the letter to state the following : "due to your interest however in a supervisory post and your good record of supervising the Fire tower operations, it has been decided to transfer you to the oil mill as supervisor as from the 26th March, 1991. Your revised wage will be E21.60 per day, trust you will enjoy working at the oil mill. You will report to MR. TAIT".

The company as earlier stated advertised for two posts of shift supervisor on 15th March, 1991. The Applicant applied for the post on 20th March, 1991 and the letter was received and initialled 21st March, 1991, Applicant testified that he was interviewed by MR. LUPTON and took up the new post one day after the interview. The letter by the General Manager dated 23rd March, 1991 transfers the Applicant to fill the advertised post of a supervisor at the oil mill at a revised wage of E21.60 per day.

The reason given for this transfer was the interest Applicant had shown in a supervisory post and good record of supervising the Fire tower operations. The Applicant contends that he never received this letter whose contents fly on the face of MR. HOHLS testimony that Applicant had never been a supervisor at the Fire tower since he had no aptitude to be a supervisor and that they had decided to employ two shift supervisors at the oil mill and down grade the advertised post of shift supervisor. This was in an attempt to explain why all the benefits claimed by Applicant did not go with his transfer. We re-iterate this evidence as it brings the credibility of MR. HOHLS into issue yet for reasons beyond the control of the Respondents they could not call MR. T.G. LUPTON nor MR. TAIT the immediate supervisor of the Applicant to testify.

According to the applicant, by a letter dated 26th August, 1994 which letter is annexed to the application and marked "C" the Respondent purported to promote the Applicant to a position of a monthly paid supervisor with a monthly pay of E800.00 which promotion was backdated to 26th July, 1994. It is Applicant's contention that the new General Manager MR. I.R. RANKINE, who was also not called to testify purported to promote him to a position that he already held since the 26th March, 1991. Interesting still, this position did not attract benefits that attached to the position Applicant had applied for in 1991.

It is common cause that Applicant was transferred to pine harvesting department when the oil mill closed in 1994. He held the position of a senior supervisor there until when his services were terminated by a notice dated 22nd March, 1996 which notice was to take

effect on 25th April, 1996. The said notice was issued under Section 36 (j) of the Employment Act No.5 of 1980 for reasons of redundancy.

The Applicant testified that this dismissal was unfair and contrary to the provisions of Employment Act 1980, in that it was victimisation for his persistence with the grievance of non-payment of increased wages and benefits since March, 1991. He further alleged in particular the dismissal followed a formal complaint about his dues in a letter dated 15th February, 1996 addressed to the General Manager of the Respondent. He also claimed that every time he had raised the issue of under-payments with the Production Manager MR. TAIT, the said Manager threatened him with dismissal. The General Manager MR. LUPTON told him that there was nothing he could do about the nonpayment of his dues since MR. TAIT was responsible for implementing his promotion wage.

At the time he made a formal complaint on the 15th February, 1996 the Production Manager was MR. PAUL JACOVELLI. He told the court that MR JACOVELLI summoned him to his office on receipt of his complaint and told him outright that he could not consider it. The Applicant then asked him for permission to talk to the General Manager but MR. JACOVELLI declined. He told the Applicant that he would discuss the matter with the General Manager and then report to him.

The Applicant told the court that while he was waiting for the feed back from MR, JACOVELLI, MR JACOVELLI served him with a letter of dismissal. The Applicant asked him whether this was due to his complaint, but he was informed that the company was retrenching. This evidence of the Applicant remains uncontroverted as neither MR. TAIT, MR. JACOVELLI nor MR. LUPTON were called to testify.

The Respondent handed in exhibit "R1" which is a notice dated 22nd March, 1991 to the Labour Commissioner in terms of Section 40 (2) of the Employment Act. The notice was written by the then General Manager MR. IAN RANKINE and is titled "Termination of contracts of employment due to Section closures." The notice stated that the Respondent intended to declare 51 employees redundant on the 25th April, 1996. Attached to the notice was a list of the occupations and current remunerations of the affected employees. The notice further stated :

"The redundancies are necessary due to the restructuring of SFC, with the resultant closure of sections and operations which are loss making or are not essential to the company."

The General Manager continued to explain in the said notice that whenever possible employees in the sections facing closure have been redeployed to other areas of the company during February and March, but all vacancies had now been filed.

Nowhere does this notice indicate that employees not working in sections that had not closed would be selected for redundancy. As it turned out, the Applicant and one EZEKIEL HLOPHE were the only employees selected for redundancy outside the sections that had closed. It is for this reason that he told this court he was selected due to his claim for underpayments and arrears in respect thereof since 1991 when he claims to have been promoted to the position of shift supervisor.

The position held by the Applicant did not become redundant by fact of closure. The Applicant further testified that his position was taken over by one PATRICK DLAMIN1 and he was directed to hand over to him upon his dismissal. This evidence was denied by the Respondent who stated that the Applicant had been reporting to MR. PATRICK DLAMINI prior to his retrenchment.

The Applicant submitted his letter of dismissal as exhibit "B2" which is dated 22nd March, 1996 informing Mm that his services with the company would be terminated as of the 25th April, 1996. The

reason given in the letter for the decision is as follows : "due to the restructuring of the Harvesting Section." It is common cause that at the time of this restructuring exercise, the Applicant was working for the Pine Clearing section which section was not closed and is still operational todate.

It is our considered view that the Respondent has failed to reasonably justify the dismissal of the Applicant on grounds of redundancy. The Applicant on a balance of probability has shown that he was wrongfully selected for dismissal. His explanation, however falls short of victimisation as envisaged under Section 85 of the Industrial Relations Act and therefore his claim for victimisation under this Section stands to fail.

According to a Report of dispute handed in as exhibit "B6" the Applicant made his report to the Labour Commissioner on 5th June, 1996. The report constituted a claim for unfair dismissal and non-payment of promotion dues since 15th March, 1991. The claim for unfair dismissal was within the six months period stipulated by law. The Labour Commissioner acknowledged receipt of dispute on 6th June, 1996. The Commissioner of Labour acceded to a request for extension of time in terms of Section 57 (1) and a certificate of extension of time dated 10th January, 1997 was panted. This extension specifically related to the claim of underpayments which had dated as far back as 26th March, 1991.

The Respondent claims that no conciliation took place after this extension or before and therefore the Commissioner of Labour acted ultravires his powers in issuing a certificate of unresolved dispute dated 26th January, 1998.

The Commissioner therein purports to have intervened in this matter on 5 June, 1997. Recalling that the dispute was first reported on 5th June, 1996 then such intervention occurred exactly one year after the date of such report. It is most unfortunate that this

matter was not raised at all in limine until the Respondent introduced it during cross examination of the Applicant.

It is common practice for such issues to be raised in limine to avail the Applicant opportunity to reconsider his application and where desirable the matter is referred back to the Labour Commissioner to consider the matter afresh in terms of Section 57 (1) of the Industrial Relations Act of 1996. Raising this issue in the middle of the trial is highly prejudicial to the Applicant's case. In terms of Section 61 (1) of the Act, the Commissioner is obliged to conciliate on matters within 21 days from the date of the report, and where this is not possible the parties to the dispute should in writing request for an extension of the time. This did not happen here, but attempt to conciliate did take place on 5th June, 1997 subsequent to which the matter was certified as unresolved.

MR. SIBANDZE for the Respondent relied on the decision of MARTIN BANDA, President of the Industrial Court (as he then was) in the case of PETER MASEKO v SWAZILAND CEMENT PRODUCT LTD (unrept) INDUSTRIAL COURT OF SWAZILAND - CASE NO. 4/96 wherein it was decided that the Commissioner of Labour acted ultravires his powers by attempting to conciliate and subsequently issuing a certificate of unresolved dispute well after 21 days since the date of the report without first obtaining a written consent from the parties to the dispute.

Whereas the decision of the learned President is sound, it did not take into consideration the powers of the Commissioner under Section 62 (1) to intervene in any dispute at anytime before a report is made or deemed to have been made for purposes of either advising the parties thereto "and of conciliation with a view to the settlement of dispute."

MR. SIBANDZE correctly submitted that the Applicant ought to have reported the matter afresh in the absence of any agreement by the parties to extend the time within which the Labour Commissioner could conciliate. There was no valid report by the Applicant on 5th June, 1997 but the Commissioner rightly intervened with a view to conciliate and reach a settlement. In his own words in paragraph 4 of the certificate of unresolved dispute he states "The dispute between the above parties which was reported to or intervened by me on the 5th June, 1997." Whether the Commissioner proceeded under Section 57 (1) or 58 (1) the reality of the matter is that his action amounted to an intervention in the dispute in terms of Section 62 (1) of the Act. The certificate of unresolved dispute issued on the 26th

October, 1998 is therefore valid and this court has jurisdiction to entertain this application.

Accordingly we order the following :

(a) The Respondent pays 15 months compensation for unfair dismissal in terms of Section 15 of the Industrial Relations Act in the sum of E13,650.
(b) There will be no order as to costs.

The members concur.

NDERI NDUMA PRESIDENT OF THE INDUSTRIAL COURT