IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 26/2003

In the matter between:

KENNETH NGCAMPHALALA Applicant

and

SWAZILAND DEVELOPMENT AND SAVINGS BANK Respondent

CORAM:

NKOSINATHI NKONYANE : A-J

D. MANGO : MEMBER

G. NDZINISA : MEMBER

FOR APPLICANT : P. R. DUNSEITH

FOR RESPONDENT : M. SIBANDZE

JUDGEMENT - 17/03/05

The Applicant in this matter was an employee of the Respondent.

He is claiming re-instatement or alternatively maximum compensation calculated at twenty-four months and costs.

His case before the court was that he was unlawfully terminated by the Respondent under the guise of redundancy.

The Respondent's case was that the Applicant was lawfully terminated following the declaration of the post that he was occupying as redundant.

The channels of reporting a dispute were followed but the dispute could not be resolved. The matter is thus before the court under a certificate of unresolved dispute issued by a Conciliation Mediation and Arbitration Commission (CMAC) official.

The evidence led before the court revealed that the Applicant was employed by the Respondent on the 1st January 1997 as a Personal Assistant to the Managing Director.

During September 1999 the Respondent unilaterally abolished the Applicant's post. The Applicant was not allocated an alternative position. From that period a war of attrition began between the parties.

The Applicant wanted to know what his position at the Respondent's undertaking was. No clear answer was forthcoming until 2001 when he was told that his post had been abolished.

The evidence revealed further that, during the time when the Applicant was hired, the Respondent bank was being run by a team of consultants by the name of AMSCO.

The Applicant said that as a Personal Assistant (P.A.) to the Managing Director he was being trained to be the Manager of the bank. He handed to court his job description being annexure "KBM 1" page 6. In terms of that job description however the main purpose of the job is "training of tomorrow's senior executives."

The AMSCO team left and Central Bank got into the picture.

Another team of consultants was appointed to run the bank. This team was called IDI.

The Applicant queried the legality of this appointment and pointed out that the Central Bank had no power to appoint IDI. It seems that that query by the Applicant only added to his problems.

The Respondent instituted disciplinary proceedings against the Applicant. The Applicant however emerged unscathed.

From the evidence before the court, it seems the Respondent was trying all it could to have the Applicant removed from its establishment.

The Applicant spent about two years in limbo. He was the only witness for his case.

Three witnesses testified on behalf of the Respondent. RW1, Henry Mthethwa's evidence was not quite relevant to the question of redundancy, which was the issue to be decided by the court.

RW2, Stanley Matsebula told the court that when he came in as the Managing Director of the Respondent bank he was tasked to finalize the pending issue of the Applicant's position at the bank. He said the first meeting that he had with the Applicant was a difficult one. He said the Applicant accused him of having taken his position.

Mr. Matsebula said he had already been told by RW3, Vinah Nkambule, that the Applicant considered himself as Managing Director material. Matsebula said it was the Applicant who initiated the package. The evidence revealed that that meeting ended badly with Matsebula threatening to call the police.

RW3, Vinah Nkambule told the court that she was acting Managing Director before the appointment of the substantive Managing Director, Mr. Stanley Matsebula. She told the court that the Applicant expected to be the Managing Director when AMSCO left. She also told the court that the Applicant felt that the General Manager's positions were lower for him.

During cross examination, RW3 said the Applicant became redundant when the new structure was approved. She was unable however, to say when was it approved.

When RW3 was asked if the structure that appears on annexure 'KBNl' page 14 was the one that was approved by the Respondent, she said she was not sure. When it was put to her that she was being evasive, she said it has been along time since she had been at the Respondent bank.

RW3 when asked why she found it strange when the Applicant asked for the position of Deputy Managing Director, she said she was not sure if those titles were correctly specified in the structure.

When asked if she would have known of any other new structure, RW3 said she could not recall properly.
From the above observations, the court comes to the conclusion that RW3 was not a reliable witness.

RW2 told the court that the position of Personal Assistant to the Managing Director had been abolished. During cross examination he said he did not know if the bank did look for any other position for the Applicant.

During submissions the Respondent's attorney argued that the position of Personal Assistant to the Managing Director had been made redundant and not the individual.

The question that the court must determine is whether it was fair to abolish the Applicant's position without his knowledge or consultation.

It was common cause that the Applicant was not consulted before the decision to declare his position redundant was made.

P.A.K. Le Roux and Andre Van Niekerk in their book " The South African Law of Unfair Dismissal" at page 247 state that:-

[11] The requirement of consultation is one which has its origins in ILO recommendation 119 ……..ILO instruments provide that an employer contemplating termination of employment should give worker representatives an opportunity to consult on measures to avert or minimize the termination and measures to mitigate their adverse effects."

When dealing with ILO Conventions the Industrial Court of Appeal of Swaziland in the case of Zodwa Kingsley and 10 Others v Swaziland Industrial Development Company Limited, Appeal Case No. 11/2003, held at page 5 that:-

"*In so far as it may be argued that the Labour Relations Act of 2000 did not incorporate the Conventions and Recommendations of the International Labour Organization and as it is necessary to remove any doubt about it, this court after due consideration, hereby finds and confirms that the Conventions and Recommendations of the International Labour Organization apply in the Kingdom of Swaziland and must be adhered to and be applied in conjunction with the labour legislation of Swaziland.*"

In light of the above authorities, it is clear that the Respondent had a duty to consult the Applicant.

It was also argued on behalf of the Respondent that there was no need to consult the Applicant as the abolishment of the Applicant's position was a policy decision and fell within the ambit of managerial prerogative.

This argument raised the question as to when or at what stage must the employee be consulted before he is retrenched. Is it at the time of the making of the decision or at the time when the decision is to be implemented. This issue is also discussed by the learned authors, Le Roux and Van Niekerk at pages 248-250.

The learned authors say that there are two opposing views on the issue. One view says that there is no obligation to consult the employee when the decision to

retrench is made. The other view says that it is not open to management to decide unilaterally.

The learned authors make the following conclusion at page 250 after having analyzed the case law on the subject:-

" ***The purpose of consultation is to explore options identified by the employer, to solicit further options from employees and to seriously consider them. Employers, employees and their representatives should have the opportunity to consider and exhaust all reasonable alternatives to ensure, as far as possible the economic survival of the business and the livelihood of those it employs. To confine the requirement of consultation to the implementation of a decision to, for example, close a department or contract out a particular function is to deny this opportunity.***"

The court will accordingly adopt the view held by the Learned authors, and come to the conclusion that the Respondent's failure to consult the Applicant or his representatives before it decided to abolish his post, denied him the opportunity to make his proposals on the issues and the management to seriously consider them.

It was therefore unfair for the Respondent to declare the Applicant's post redundant without prior consultations.

It was argued on behalf of the Respondent that Matsebula did consult the Applicant before he was terminated. The evidence revealed that there was confrontation between the Applicant and Matsebula when the two met, to the extent that Matsebula threatened to call the police. Matsebula told the court that the Applicant was adamant that he should have been the Managing Director of the Respondent.

The evidence revealed that there was more of confrontation than consultation between the parties. The court therefore comes to the conclusion that there was no meaningful consultation between the parties.

In terms of the job description of the Applicant, one of his duties and responsibilities was to assist in the successful restructuring and turn around operation of the bank.

It is surprising therefore to note that he was not involved in the restructuring that resulted in his position being abolished. Clearly the Respondent acted in bad faith when it declared his post redundant without his involvement.

In the Industrial Court of Appeal Case of Zodwa Kingsley and 10 Others v Swaziland Industrial Development Company Limited, referred to above, at page 3, dealing with the question of redundancy the court pointed out that:

"The test thus prescribed is that the court, when considering the matter, must assess the evidence and make a finding whether the employee in fact was redundant or not."

In this case there was no evidence that the Respondent had ceased to carry on the business or activity in which the Applicant was employed. For some reasons not known to the Applicant and the court, the Respondent just decided to abolish the post of the Applicant.

The Respondent therefore having failed to consult the Applicant prior to the abolishment of his post, there having been no meaningful consultation before he was terminated and the Respondent having failed to state the reasons that necessitated the post to be declared redundant, the court will come to the conclusion that he was unfairly dismissed by the Respondent.

Relief:

The Applicant is claiming re-instatement or alternatively maximum compensation of twenty four months. The Applicant says its dismissal was automatically unfair.
The court will not make an order for re-instatement as the Applicant's post no longer exists. On the question of automatically unfair dismissal, there was no evidence that the Applicant was dismissed for taking legal action against the Respondent.

From the evidence before court, the main reason for the strained relationship between the parties was that the Respondent accused the Applicant of having misrepresented his former position at First National Bank. The Applicant told the recruitment agent that he was a Credit Manager at First National Bank. The Respondent got information that he was not a Credit Manager but a Branch Manager. That however was not correct. The Applicant was employed as Credit Manager at First National Bank, but was transferred to the branch to learn the operations system of the bank. He was appointed to that position but did not perform that responsibility until he joined Swazi Bank. It also transpired during the trial that the Respondent got other information from the Applicant's former employer indicating that the Applicant's performance was far from satisfactory. The Respondent then began to engage in a process of getting rid of the Applicant. The Applicant instituted legal proceedings against the Respondent well after his post had been removed from the organizational structure.

It seems therefore that the facts of this case do not meet the requirements of the definition of "automatically unfair dismissal" under Section 2 of the Industrial Relations Act No. 1 of 2000.

The Applicant is therefore only entitled to compensation for unfair dismissal calculated at twelve months salary. The Applicant told the court that he earned about E27,000;00 per month. He was unable however to tell the court how this figure was arrived at. He did not present to court his salary advice slip. He was only able to tell the court that his basic salary was E19,643.00 per month, and that he was entitled to twenty-four hours security at E2,400:00 per month. He said he was currently unemployed and depended on his wife for support and that he has four children. The court will take into account the fact that the banking industry is too small in Swaziland and it is unlikely that the Applicant can get employment in the banking sector again. The court will therefore make an award for maximum compensation in this case.

The Respondent is accordingly ordered to pay the sum of (E22,043:00 x 12) = E264,516-.00 to the Applicant as compensation for the unfair dismissal.

No order as to costs is made.

The amount is to be payable within fourteen (14) days after the delivery of this judgement.

The members agree.

NKOSINATHI NKONYANE-AJ

INDUSTRIAL COURT