IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 242/03

In the matter between:

JOHN WEATHERSON APPLICANT

And

USUTHU FARM RESPONDENT

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: P. R. DUNSEITH

FOR RESPONDENT: J. S. MAGAGULA

J U D G E M E N T - 31/01/05

The Applicant John Weatherson, formerly the Managing Director of the Respondent, Usuthu Farm brought an application for determination of an unresolved dispute in terms of Section 85 of the Industrial Relations Act, No. 1 of 2000.

The Applicant claims maximum compensation for alleged unfair termination of his services with effect from the 11th March 2003.

The reason for the termination as alleged in the letter of termination was that xthe farm is scaling down its operations'. The Applicant was therefore retrenched.

He alleges in the particulars of claim that the termination of his services was unlawful, unfair and unreasonable in that:

1. The Respondent did not comply with the provisions of Section 40 of the Employment Act, 1980 (as amended);

2. The Respondent did not give the Applicant adequate or any notice of his retrenchment;

3. The Respondent did not consult with the Applicant prior to his retrenchment.

4. And that the retrenchment of the Applicant was not bonafide and could have been avoided.

In addition to the claim for maximum compensation, the Applicant further claims benefits owed to him by the Respondent as follows:

1. Education Allowance in the sum of E46,900.00 (Forty Six Thousand Nine Hundred Emalangeni).

2. Dollar difference reimbursement as per agreement with the Board in the sum of E27,000.00 (Twenty

Seven Thousand Emalangeni).

We will note at this point that the 2nd item was conceded by the National Director of World Vision Swaziland who is also a Board Member of the Respondent. The aforesaid sum of E27,000.00 is outstanding out rightly and is awarded to the Applicant therefore.

At the time the matter was brought to the Industrial Court, other terminal benefits listed under schedule XD' had already been paid pursuant to an urgent application at the High Court and an attachment of the Respondent's assets.

The statutory benefits comprising of severance allowance, notice pay, leave pay, medical aid reimbursement, salary for six days worked up to the 11th March 2003 and additional notice had been offset. Schedule C however represents allegedly the proper recalculation of the said benefits and the Applicant claims the difference thereof, having acknowledged receipt of E61,203.96. The difference claimed amounts to E102,730.20. This however is inclusive of the non contested E27,000.00 dollar difference and the school fees aforesaid.

The court was specifically requested by Mr. Dunseith for the Applicant to note the lack-adaisical attitude of the Respondent towards the Applicant as derived from the necessity to approach the High Court to receive non contested items, aforesaid.

It was submitted that this was the attitude that prevailed at the time of the alleged retrenchment, which in the Applicant's view was a disguised dismissal.

Upon termination, the Applicant reported the dispute to the Labour Commissioner. Efforts by CMAC to resolve the dispute via conciliation failed and the certificate of unresolved dispute was issued on the 1st September 2003, in terms of Section 85 (1) of the Act.

At the time of the termination, the Applicant earned E12,600.00 (Twelve Thousand Six Hundred Emalangeni) salary per month and the enumerated benefits.

A spirited effort that however was in vain was made by the Respondent to disclaim school fees in respect of the Applicant's children at Waterford Kamhlaba for the year 2003.

The documentation presented before court comprising of correspondence from the donors that funded the Respondent and the minutes of the Board meeting clearly show that a provision had already been made for the payment of the annual fees of the children for the year 2003. Indeed the money had already been dispatched by the donor at the time of the termination. Refusal to forward the donation to the intended recipient can only be described by the court as callous and most inconsiderate especially in view of the fact that no immediate payment of terminal benefits was made to the Applicant upon termination.

He was indeed placed in a very embarrassing situation with respect to his children at Waterford. This can hardly be described as a Christian attitude that the Employer professed to follow to the letter and encouraged its employees to abide by. The court finds therefore that a sum of E46,900.00 (Fourty Six Thousand Nine Hundred Emalangeni) is owed by the Respondent to the Applicant and same is to be paid forthwith.

The Respondent hardly contested the recalculated difference in respect of severance allowance, notice pay, additional notice, leave pay, medical aid reimbursement and salary for days worked as may be seen from the two annexures *C and TJ' representing the total difference less the sum of E61,203.95 (Sixty One Thousand Two Hundred and Three Emalangeni and Ninety Five Twenty Cents) already paid.

The court finds in view of the afore-going that the said sum has been proven to its satisfaction as owing to the Applicant in total. The Respondent is directed to pay the same.

The only other outstanding issue and actually, the key one, for that matter is whether or not the termination of the Applicant was done for a reason permitted by Section 36 of the Employment Act and if so, whether the termination was fair, just and reasonable in all the circumstances of the case.

The onus to discharge this burden rests squarely on the Employer in terms of Section 42 (2) (a) and (b) of the Employment Act.

It is not disputed that the Applicant was an employee to whom Section 35 of the Employment Act applied. The section obliges every employer to only dismiss an employee covered thereof for a fair reason hence the onus created by Section 42 aforesaid.

In the endeavour to discharge this onus, the Respondent adduced evidence of the National Director of World Vision Swaziland and a Board Member of the Respondent Mr. Patrick Siame.

The witness told the court that the Respondent farm was a project under the auspices of World Vision Swaziland and was fully donor funded to create employment for the rural communities at Luyengo.

The Applicant, an Agriculturist was initially commissioned to write the project proposal, which he did and the same was approved by the targeted donor. He was then employed as the project's first manager in terms of a two-year contract of employment in 1998. The contract was renewed twice. At the time of termination the Applicant was serving the third contract.

A sample of the contract was produced and marked exhibit 'A'. The same stipulates the terms of employment for the Farm Manager and a job description was attached to the same.

The Applicant in terms thereof reported to Mr. Siarne the National Director of World Vision and a member of the Board of Directors of the Respondent.

It was specifically provided therein that the 'ultimate management responsibility for the Usuthu Farm lies with World Vision Swaziland'.

The Diocesan Trust Board of the Anglican Church in Swaziland was also a partner to the farming venture; the chairman of the Board was one Tom Mbelu.

According to Mr. Siame, since 1998 when the farm operation commenced up to the date the Applicant was retrenched, the farm operation had failed to make a profit. The sustainability of the entire project had been brought to question because for the fourth year in a row, the Farm continued to depend on

donations from the World Vision in the United States of America. The donor had developed fatigue as a consequence and demanded that the project be terminated.

That the concerns of the Donor were shared with the Applicant and all the issues were discussed in the Board meetings. The applicant, being the Chief Executive Officer of the project was a key player and the failure or success of the project largely depended on him. The Applicant attended the Board meetings and was very well aware of the financial constraints the project was undergoing. He was aware that his salary and benefits was a major expense for the farm and the project could not be expected to retain him even when it was clear that it could not, and had not thus far generated adequate income to cover that expense.

The farm operation was labour intensive and had a large workforce that also depended initially on the donations but was expected to be sustained by the project once it had become viable.

According to Mr. Siame as at the year 2004, it had become clear to the Board and the donors that the project had failed to sustain itself and retrenchment of the Applicant and other employees was inevitable.

He told the court that this issue was discussed with the Applicant on numerous occasions and this was well documented in correspondence between the Board and the Applicant and in the Minutes of the Board meetings.

The budget for the period October 2002, to September 2003, prepared by the Applicant and reviewed by an external accountant by the name of N, Ormsher indicated that a significant increase in production

was forecast from March 2003. To achieve this however, sufficient working capital was required to finance inputs.

The stalemate came when the World Vision, U.S.A. upon which the project had all along depended refused to disburse the capital ejectment needed to sustain the forecast production for the year 2003.

The project at that point had no revenue internally generated to cover up for the donation that had been expected but was not forthcoming.

The sticking point between the parties while in agreement that the project was in financial dire straights was that the Applicant remained optimistic that funds could be sourced from other Donors and that the project remained highly viable subject to that capital ejectment. The Respondent represented by the Board on the other hand however held a gloomy view of the project and was convinced that the project had run its course and the Applicant in particular could not take it any further.

They felt that the Applicant had significantly failed in his responsibilities towards the project and that they could no longer continue to retain him. Furthermore the operation had to be down sized by way of staff reduction if it were to survive.

Other options suggested by the Applicant to jump start the project were not considered suitable by the Board. This culminated in the decision to retrench the Applicant and subsequently in staff reduction. Soon thereafter, the entire project collapsed and ceased to operate.

The Applicant told the court that he was not consulted at all prior to the retrenchment and the decision came to him like a bolt from the blue. He added that the various options he had offered the Board to sustain the farm operations were unreasonably ignored.

That the failure by the World Vision Swaziland to provide financial services to the project, contrary to the initial undertaking significantly contributed to the collapse of the project.

He denied that he was ineffective as a manager but to the contrary painted what would have been a very bright future for the project had World Vision Swaziland played its role in a meaningful manner.

Looking at the two versions of the events leading to the termination of the Applicant, the inescapable conclusion is that for whatever reason, as of March 2003 the Respondent farm had failed to marshal sufficient capital ejectment to sustain production.

That the key donor had withdrawn its support and wanted the project to be terminated.

That given the circumstances and considering the relatively high salary and benefits the Applicant enjoyed, the project could no longer be able to sustain his employment.

The court is satisfied that, notwithstanding that there was no specific forum convened specifically to discuss the termination of the Applicant's employment, by virtue of his position, and access to the Board meetings and management correspondence, the Applicant was all along aware of the possibility

of his termination. Indeed a document produced in one of the Board meetings, prepared by Mr. Gumede, a legal officer at World Vision fully canvassed the possibility and the consequences of retrenching the Applicant and other staff members.

The evidence available indicates that as at the 11th March 2003, only the Applicant was retrenched and therefore Section 40 of the Employment Act No. 5 of 1980 did not come into play. The court did not get specific information as to when other employees were retrenched. The fact of the matter is that, subsequently on a date, month or year not specified, the entire operation came to a halt.

The court upon consideration of the entire evidence is of the view that the Applicant's employment was terminated for operational reasons and in conformity with the provisions of Section 36 (j) of the Employment Act, that deems retrenchment fair.

In terms of Section 42 (2) (a) the Applicant was dismissed therefore for a lawful reason.

It being a foregone conclusion that the collapse of the Respondent was imminent at the time of the said retrenchment and in terms of Section 42 (2) (b) of the Act it was fair and reasonable in all the circumstances of the case to terminate the services of the Applicant.

In conclusion, the Respondent is only liable to pay terminal benefits earlier enumerated in the sum of E102,730.20 (One Hundred ad Two Thousand Seven Hundred and Thirty Emalangeni and Twenty Cents).

There will be no order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT-INDUSTRIAL COURT