IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 341/03**

In the matter between:

LONHLANHLA MASUKU **Applicant**

and

K. K. INVESTMENTS (PTY) LIMITED **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**S. SIMELANE**
FOR RESPONDENT	**:**	**J. SHEKWA**

J U D G E M E N T – 17/10/2006

1. The Applicant Lonhlanhla Masuku was employed by the Respondent KK Investment (Pty) Limited on the 1st April 1996 to be a cashier in the Respondent's supermarket at Piggs Peak. At the time, the Respondent owned and operated a number of wholesale and retail businesses in the Northern Hhohho region of Swaziland.

2. During the latter half of 2002, the Applicant was injured in a motor

accident. As a result she was absent from work on sick leave for a number of months. When she returned to work on 12th November 2002, she was called to the office of the Human Resources Manager Mr. Elmon Dlamini. Other members of management were also present. She was informed that she was being retrenched. She was given a letter of termination.

3. The letter of termination was handed into court as an exhibit. In the letter, the Applicant is notified that her position in the company has been made redundant. The company gave her thirty days notice of termination, which she was not required to serve. She was invited to collect her terminal benefits, presumably at the end of the notice period on 16th December 2002.

4. The Applicant reported a dispute in terms of the Industrial Relations Act 2000, claiming that her services had been unfairly terminated. The Conciliation, Mediation and Arbitration Commission issued a certificate of unresolved dispute. The certificate reflects that the parties reached an understanding during conciliation regarding payment of terminal benefits, and the only outstanding issue in dispute related to the Applicant's claim that she had been unfairly dismissed.

5. The Applicant duly instituted an application in the Industrial Court claiming maximum compensation for unfair dismissal. She did not claim payment of terminal benefits on the understanding that this issue had been settled and payment would be made. When the matter came to trial some three years after the conciliation, it transpired that the Respondent had still not paid the Applicant's terminal benefits. This reflects badly on the Respondent's bona fides, since even if there is no agreement on the

precise calculation of the benefits, it was nevertheless incumbent on the Respondent to pay such benefits as it calculates to be due. According to a document handed in to court by the Respondent during the trial, the benefits calculated by the Respondent as payable to the Applicant in December 2002 amounted to E3662.54. The representatives of the parties undertook in court to settle the amount of the terminal benefits payable to the Applicant between them.

6. In her statement of claim, the Applicant alleges that she was terminated under the pretext of redundancy. She states that the Respondent did not observe fair labour practice in the redundancy exercise. In particular,

6.1 the Respondent did not consult with her prior to her retrenchment;

6.2 the Respondent did not apply a fair selection criterion when making her redundant;

6.3 the Respondent did not consider ways to avoid or minimise the retrenchment; and

6.4 the provisions of Section 40 of the Employment Act 1980 (as amended) were not complied with.

7. The Respondent in its Reply responded that the Applicant's services had been fairly terminated on grounds of redundancy. It denied any implication of victimisation, stating that sixty six employees from seven of its businesses had been made redundant in three phases due to financial difficulties.

8. The Respondent conceded that the Applicant was an employee to whom Section 35 of the Employment Act 1980 applies. The Respondent accordingly carries the burden of proving on a balance of probabilities that it had a fair reason for terminating the services of the Applicant, and that the termination was reasonable in all the circumstances (as per Section 42(2) of the Act).

9. The Applicant testified as to the circumstances of her retrenchment. The Respondent called one witness in its defence, namely its Human Resources Manager Mr. Elmon Dlamini.

10. It was common cause that no prior consultations were held with the Applicant before she was notified of her retrenchment. The Applicant testified that she knew nothing about the retrenchment exercise because she had been absent on sick leave. She received no communication from the Respondent warning her in advance that she might be made redundant. Notwithstanding that she was on sick leave, her employer had her home address and telephone number. At the meeting on 12th November 2002, she requested sight of the Respondent's financial statements in order to confirm that the Respondent was indeed in financial difficulties. Her request was denied. No explanation for her redundancy was given. She considered that she was being victimised because out of four cashiers at her workplace, she was the only one retrenched. Yet two of those cashiers had been employed after her by the Respondent.

11. It was put to the Applicant in cross-examination that consultations regarding the retrenchment exercise had been held with the Respondent's Works Council. She responded that she knew of no such Works Council, and in any event she had never been informed of any such consultations.

12. The Respondent's Human Resources Manager stated that it was not possible to consult with the Applicant because she was on sick leave, but in any event no consultations were held with individual employees. According to him, collective consultations were held with the Works Council, and it was the duty of the chairman of the Works Council to consult with the individual employees. It was proposed through the Works Council that all employees should change to half-day shifts. This would avoid their retrenchment, but employees' remuneration would be halved. This proposal was rejected by the employees.

13. When asked about the criterion whereby employees were selected for retrenchment, Elmon Dlamini stated that the criterion of 'last in, first out' was established by management. Nonetheless, this criterion was not used in the case of the Applicant. The reason why the Applicant was selected for retrenchment, he told the court, was that firstly she was a poor performer, and secondly she frequently absented herself from work on Saturdays in order to privately sell clothing.

14. Elmon Dlamini also explained the financial circumstances which gave rise to the need for retrenchment. Since 1999 the Respondent had suffered a severe downturn in its business turnover. The reasons for this downturn were *inter alia*:

14.1 the closure of Havelock Mine;

14.2 the downsizing of Mondi Forest;

14.3 the conclusion of the Maguga Dam construction and consequent departure of foreign workers;

14.4 the advent of new shops, causing increased competition.

15. The Respondent produced in evidence copies of financial statements for the 2001 and 2002 financial years. These statements reflect a substantial downturn in turnover and consequent losses. Elmon Dlamini said that although the company started making losses in 1999, the extent of the financial crisis only became apparent when the accounts became available in 2002. He stated that these statements could not be made available to the Applicant because they were confidential.

16. Elmon Dlamini also testified that the Respondent had complied fully with its obligations under Section 40 of the Employment Act 1980 (as amended), to the satisfaction of the Commissioner of Labour.

ANALYSIS OF FACTS AND LAW

17. The Respondent is required to prove that the reason for the termination of the Applicant's services is one permitted by Section 36 of the Employment Act. The Respondent relied upon Section 36(l), which provides that it shall be fair to terminate the services of an employee where the employee is redundant. The Respondent's case is that the Applicant was a redundant employee, as defined in Section 2 of the Employment Act, because her services were terminated because of the contraction in the volume of the Respondent's business and the financial difficulties experienced by the Respondent.

18. The Respondent has established on a balance of probabilities that it experienced a downturn in its turnover, and consequent financial losses and difficulties, due to shrinkage of its customer base and increased competition from other business enterprises.

19. The Court accepts the evidence of the Respondent's Human Resources Manager that there was a Works Council in existence at the Respondent's undertaking, notwithstanding that the Respondent did not furnish the Court with any constitution or list of office-bearers. The Court also accepts, with reservations, the evidence of the Human Resources Manager that consultation took place with the Works Council regarding the proposed retrenchment exercise.

20. The purpose of consultation with employee representatives is to minimise industrial conflict. Such consultation must necessarily include:

- Discussion of the reasons and need for retrenchment;

Consideration of options for avoiding or minimising the retrenchment;
Establishment of objective and fair criteria for identifying redundant positions and/or employees;
Discussion of the terminal benefits to be paid to retrenched employees;
Establishing a time frame for the retrenchment exercise.

21. Elmon Dlamini testified that the company's financial statements were availed to the Works Council, in order to explain the financial reasons for rationalisation of the Respondent's business. He also stated that proposals were made at Works Council level to avoid the retrenchment, namely the introduction of reduced working hours for all employees, but this option was rejected.

22. Regarding the criteria for selecting redundant positions or employees, it appears that a management decision was taken without any consultation.

23. In the absence of any record or minutes of the Works Council consultations, there is no evidence before the Court as to any other matters which were discussed with employee representatives, or

whether the consultations were comprehensive or merely cursory. Nevertheless the Court finds that some kind of consultation did occur.

24. The Court is satisfied that there was a commercial rationale which prompted the Respondent's decision to downsize its staff complement; that the decision to retrench was taken after consultation with the Works Council; and that the decision to retrench was reasonable.

25. The Court now turns to the question whether the services of the Applicant were fairly terminated for the reason that she was redundant.

26. The Respondent's Human Resources Manager stated unequivocally that the Applicant was selected for retrenchment because she was a poor performer, and because she absented herself from work on Saturdays to carry on her own business of selling clothes. These reasons were never previously conveyed to the Applicant, and she was never given the opportunity to challenge her characterisation as a poor performer, or to rebut or explain her alleged absenteeism.

27. It is required of an employer to establish fair and objective criteria when identifying employees for retrenchment. Those criteria must also be implemented in a fair, objective and transparent manner. It is now accepted that an employer in selecting candidates for retrenchments may rely on criteria such as productivity and conduct and not be confined to LIFO (Last in, First out).

(See **Engineering Industrial & Mining Workers Union & another v Starpak (Pty) Ltd (1992) 13 ILJ 655 (IC) at 658E; Raad van Mynvakbonde & andere v Harmony Goudmynmaatskappy Bpk (1993) 14 ILJ 183 (IC) at 196C; Manqindi & others v Continental**

Barrel Plating (Pty) Ltd (1994) 15 ILJ 400 (IC) at 407).

Nevertheless, if an employer decides to adopt work competency based on performance or productivity as the criterion, then an objective standard for the required competency must be determined in advance, and such criterion must be applied uniformly and even-handedly. Moreover, the rules relating to procedural fairness in cases of dismissal based on incapacity or misconduct have been held to apply: workers declared redundant based on their performance or conduct must be given an opportunity to defend their work records, and to question those of others (See **Mthembu & others v Zululand Truck Maintenance (1989)10 ILJ 1165(IC) at 1167I).**

28. The purpose of an objective, pre-determined selection criterion is to ensure that redundancy selection does not depend solely upon the subjective and personal opinion of the person making the selection. Otherwise the fairness of the process may be tainted by unreasonable preferences, prejudices and favours. (See **Shezi v Consolidated Frame Cotton Corp (1) (1984) 5 ILJ 3 (IC)**)

The intrinsic value of having objective criteria was explained as follows in **Williams v Compair Maxam 1982 IRLR 83**:

"*The purpose of having, so far as possible, objective criteria, is to ensure that redundancy is not used as a pretext for getting rid of employees whom some managers wished to get rid of for other reasons. Excepting cases where the criteria can be applied automatically (eg last in, first out) in any selection for redundancy, elements of personal judgment are bound to be required, thereby involving the risk of judgment being clouded by personal animosity. Unless some objective*

criteria are included, it is extremely difficult to demonstrate that the choice was not determined by personal likes and dislikes alone."

29. The Respondent adopted the objective criterion of LIFO, but disregarded it in the case of the Applicant. Out of four cashiers at KK Supermarket, she was the only one selected for retrenchment. The reasons for her selection were entirely subjective. It is difficult to avoid the conclusion that she was terminated not because she was redundant, but because she was not wanted.

30. In **Makgabo & others v Premier Food Industries Ltd (2000) 21 ILJ 2667 (LC) at 2675G** the court warned that an employer should not be allowed to abuse a retrenchment process to penalize its employees for misconduct or substitute same for discipline. The same can be said of using a retrenchment exercise to get rid of those employees who do not perform to the desired standard. Our labour law is quite clear: the employer must use a disciplinary hearing to resolve misconduct, and a different sort of hearing to resolve performance issues. If the Respondent, in the present case, failed to use the legitimate disciplinary measures available to an employer to resolve any of the Applicant's shortcomings, it was unfair to use the restructuring exercise to dislodge her from her employment.

31. In the judgement of the Court, it was unfair to single out the Applicant for retrenchment on the basis of her alleged poor work performance and absenteeism. There is no evidence that the Applicant was ever disciplined, warned or counselled with regard to these allegations. She was certainly given no opportunity to challenge these allegations at the time of her retrenchment. She was not even told that she was being retrenched for these reasons. According to the Respondent's own criterion of LIFO, the Applicant was not redundant. Her position as cashier was still available. The conduct of the Respondent amounts to victimisation. The Court has no hesitation in finding that the Respondent

has failed to prove that the Applicant's services were terminated on grounds of redundancy.

32. No evidence was led to justify the allegations of poor work performance and absenteeism, and in any event the Respondent has not relied on such allegations in its pleadings. The disguise of redundancy having been stripped away from the termination of the Applicant's services, the Respondent is left defenceless.

33. The Court is also of the view that the Respondent had a duty to notify the Applicant in advance that it was contemplating retrenchment and her job might be affected, and it is no excuse for the Respondent to say that the Applicant was away on sick leave. Written notification could easily have been delivered to the Applicant's home. Furthermore, there was a duty on the Respondent to consult with the Applicant individually, particularly because it adopted an individual approach to the selection of the Applicant for redundancy. As pointed out earlier in this judgement, workers declared redundant based on their performance or conduct must be given an opportunity to defend their work records, and to question those of others

34. It was the duty of the Respondent as employer to notify the Applicant of the contemplated retrenchment and to consult with her individually. This duty could not be left to works council representatives. The failure of the Respondent to give the Applicant advance notification; to consult with her individually; and to give her the opportunity to challenge the reasons for her selection for retrenchment, constitutes procedural unfairness.

35. We agree with the views expressed in **National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd , (1993) 14 ILJ 642 (LAC)**

648E:

"In the context of disciplinary or performance-related dismissals procedural *fairness generally takes the form of a disciplinary inquiry or a series of counselling sessions where the employee is allowed to state his or her case. In the context of retrenchment, we believe, the need for procedural fairness is even more acute because the employee's services stand to be terminated without any fault on his or her part. Why should an employee in the latter position be in a weaker position than one who has committed a breach of discipline or performs poorly?"*

36. For the above reasons, the termination of the Applicant's services was substantively and procedurally unfair. Having taken into account the personal circumstances of the Applicant, her six years of service with the Respondent, and the element of victimisation inherent in the manner in which the Applicant was dismissed under the guise of redundancy, the Court awards compensation equivalent to ten months remuneration.

Judgement is entered against the Respondent for payment of the sum of E10,700.00.

The Respondent is to pay the Applicant's costs.

In the event that the parties are unable to settle the terminal benefits payable within 14 days, the Applicant is granted leave to set the matter down for an order for payment of the benefits admitted by the Respondent to be due.

The members agree.

_____

PETER R. DUNSEITH

PRESIDENT OF THE INDU**STRIAL COURT**