

IN THE INDUSTRIAL COURT OF SWAZILAND**HELD AT MBABANE****CASE NO. 273/2003**

In the matter between:

CONSTANCE SIMELANE**APPLICANT**

and

SWAZILAND ELECTRICITY BOARD**RESPONDENT****CORAM:****NDERI NDUMA : PRESIDENT****JOSIAH YENDE : MEMBER****NICHOLAS MANANA : MEMEBR****LINDIFA MAMBA : FOR APPLICANT****MUSA SIBANDZE : FOR RESPONDENT****J U D G E M E N T O N R E I N S T A T E M E N T - 1 5 / 0 2 / 0 6**

The court delivered its judgement on the merits of the case and with respect to payment of terminal benefits, compensation and reinstatement on the 8th December 2005.

The Respondent being aggrieved with the judgment of the court noted an appeal against the judgement to the Industrial Court of Appeal. Simultaneously the Respondent applied for the review of the decision of the court by the High Court.

Meanwhile, the Respondent moved an application for stay of execution pending the hearing of the appeal and the Review.

On the 18th January 2006 when the application for stay of execution fell to be heard, the attorneys for the Applicant and that of the Respondent recorded a consent order that rescinded the judgement of the court with respect to the issue of reinstatement. Further in terms of the consent order, the Respondent was to lead evidence of one Sikhumbuzo Tsabedze on the issue.

The judgement sounding in money was unaffected by the consent order. It was agreed that the decretal amount be paid with interest at 9% from the date of the judgement.

On the 10th February 2006 the court heard evidence of Sikhumbuzo Tsabedze. He told the court that he was presently the General manager Corporate Services of the Respondent. That at the time of the Applicant's termination he was General Manager Human Resources. That presently Human Resources portfolio falls under Corporate Affairs.

He told the court that the Applicant held the position of Regional Accountant in Shiselweni at the time of her dismissal. That this position is no longer available at the Respondent's undertaking for the following reasons:-

1. The position was abolished in a restructuring exercise that saw the merger of the accounting offices for Lubombo and Shiselweni Region. Other positions affected by the merger were those of the Regional Engineer and Marketing officer. The

rationale of the merger was that both Regions had a total of 7,000 customers whereas Manzini region had 17,000 customers and Hhohho Region had 18,000 customers.

Those officers affected by the merger were all redeployed. None were retrenched.

2. The Respondent is looking into a further restructuring soon, that would see retrenchment of staff. It is not plausible therefore to take up the Applicant at this time

In its judgement the court found that the Applicant was dismissed unlawfully and unfairly whilst she was on a study leave in the United Kingdom.

The reason for the dismissal was the wrong decision by the Respondent to the effect that it had not authorized the Applicant to embark on the study leave.

There was no new evidence by Sikhumbuzo Tsabedze that touched on the work performance, qualifications or conduct of the Applicant that may disqualify her from continuing to hold the position she was unlawfully and unfairly dismissed from

At the time of the merger this suit was pending before court and the respondent was bound to take into account the possibility of the Applicant's reinstatement by the court.

The Respondent is the largest corporation in the Kingdom, with a work force of over 767 employees. The Respondent did not find it difficult to re-deploy all the employees affected by the merger. The court finds no

reason why it could have difficulties placing the Applicant to a suitable position. This should take into consideration that she completed her MBA programme successfully and she is in all probability more than before able to serve the Respondent better.

Another factor in favour of her reinstatement is that the previous Acting Managing Director, who had dismissed the Applicant has since been replaced by another Managing Director. This lessens the possibility of any conflict between the Applicant and top management.

Furthermore once the court finds that a dismissal is unfair in terms of Section 16 (2) of the Industrial Relations Act No. 1 of 2000, "*the court shall require the employer to reinstate or re-engage the employee unless-*

- (a) *The employee does not wish to be reinstated or re-engaged.*
- (b) *The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.*

It is not reasonably practicable for the employer to reinstate or re-engage the employee;

- (c) *The dismissal is unfair only because the employer did not follow a fair procedure."*

In any enquiry in terms of Section 16 (2) of the Act, the employer bears the onus to prove any of the impediments to reinstatement enumerated therein. Such must be done by way of adducing evidence and on a balance of probability.

The court finds that the Respondent has failed in this endeavour and therefore directs that the Respondent should re-engage the Applicant with effect from the date of the termination.

The variation of the order for reinstatement to one for re-engagement is in view of the evidence of the merger adduced by the Respondent.

Such re-engagement will be with effect from the 3rd April 2002. The Applicant is to be paid full salary in arrears with effect from the date of re-engagement less the monthly salary of E8,800 (Eight Thousand Eight Hundred Emalangi) received by the Applicant from May 2004 from the current employer.

The court reiterates the further orders contained in the judgement of the 8th December 2005 as follows:

1. In terms of prayer 1.1 the Respondent is to pay an arrear salary of E218,719.80 that accrued from the date of stoppage of the salary to the date of dismissal.
2. In terms of prayer 1.2 the Respondent is to pay E35,000 being the tuition fees in terms of the Agreement.
3. In terms of prayer 1.3 the Respondent is to re-engage the Applicant with effect from the 3rd April 2002 with full pay in arrears less E8,800 salary received by the Applicant monthly from her new employer from May 2004 to the date of payment.

The Respondent is to pay the costs of the application including costs for the further hearing for reinstatement.

The members agree.

NDERI NDUMA
JUDGE PRESIDENT - INDUSTRIAL COURT