INDUSTRIAL COURT APPEAL OF SWAZILAND

Held at Mbabane

APPEAL CASE NO. 15/2003

In the matter between:

SWAZI OBSERVER (PTY) LIMITED **APPELLANT**

and

HANSOJ^NGWENYA-AND-68-OTHERS **RESPONDENT**

CORAM:

J. P. AN NAN DALE JP

J. M. MATESBULA J A

S. B. MAPHALALA JA

FOR APPELLANT: ADV. SMITH INSTRUCTED BY MILLIN & CURRIE ATTORNEYS

FOR RESPONDENT : P. R. DUNSEITH OF P. R. DUNSEITH ATTORNEYS

APPEAL JUDGEMENT-09/03/06

The appellant noted an appeal against the judgement of Nkambule 1 sitting with nominated members of the Industrial Court and the judgement was handed down on the 23rd March 2002.

1. The present respondents were applicants in the court aquo and the appellant was the respondent. According to the judgement of the court aquo the respondents had moved an application seeking payment by the appellant of a sum of E3,952,427.20. The learned judge of the court aquo, as he was entitled to do dealt extensively with both the facts and the law given in evidence. The sum claims was in respect of 24 months maximum compensation for unfair dismissal.

1.1. The points of law to be determined amongst others was whether the termination of the respondent's employment was one permitted in terms of Section 36 of the Employment Act and whether the provisions of Section 40 of the Employment Act were complied with.

1.2. Section 36 (j) of the Employment Act provides that it shall be a fair reason to terminate the services of an employee if he is redundant. Whereas Section 40 of the Employment Act required that procedural requisites be complied with. The onus in respect of both the provisions of Section 36 and 40 rest squarely on the employer in this case the appellant.

2. The learned judge of the court aquo found that the appellant had satisfied the provisions of Section 36 (j) of the Employment Act i.e. that termination was one permitted in terms of the provisions of this section and that the respondents had become redundant. The learned judge found in respect of Section 40 of the Employment Act that the appellant had not discharged the onus resting on it.

At p. 5 of his judgement the learned judge states:

"*Consequently the violation of legal procedures and the conduct of the respondent renders the termination of the applicants' services unreasonable and therefore substantively unfair*".

2.1. The learned judge then ordered the respondents to prepare affidavits

stating their personal circumstances. This was done on the 4th September 2003 and the court *a quo* handed down an award after finding that the opposition by the appellant had no basis in law and found that it was aimed at delaying payment of

—-compensation—-to-—the-— respondents. The award-.....totalled —

E2,913,588.20.

[3] The appellant's grounds of appeal were initially numbered 1 to 16. These were filed by Mr. Mamba who on numerous occasions applied for postponements which were granted and Mr. Mamba eventually withdrew as attorney of record for the appellants. I agree with Mr. Dunseith that these postponements occasioned tremendous prejudice to the respondents.

3.1. When finally the matter was called for hearing after Mr. Mamba had withdrawn, Mr. Sibandze was the new attorney of record. He had instructed Advocate Smith to argue the matter. Mr. Smith informed the court at commencement of the hearing that he was abandoning grounds 4, 5, 6, 7 and 8. These are grounds which were originally noted by Mr. Mamba as grounds of appeal.

[4] <u>As regards ground 1</u>

"*The court erred in finding that the Industrial Relations Act of 1996 was applicable to the dispute. The court should have found that the Industrial Relations Act, 1 of 2000, was to apply.*" I agree with counsel for the respondents that the respondents had a vested right in terms of the 1996 Act to recover compensation up to 24 months salary, notwithstanding that the new Act provided otherwise. If the new Act intended to affect the vested right it should say so unequivocally. This, the Act does not do.

4.1. The respondents correctly claimed 24 months salary and in my view this claim was in accordance with the Industrial Relations Act of 1996 and in respect to which they had a vested right. The new Act of 2000 does not specifically state that the provisions of the new Act .woiild^also^affect nested-rights-of-persons.—

4.2 This was clearly the *ratio decidendi* in the case of EUROMARINE INTERNATIONAL VS THE SHIP BERG 1986 (2) 700 AD 710 where it was stated "where a statutory provision affects a person's substantive rights, the provision should be construed as having no retrospective effect, unless the provision is clearly to the contrary.
Similarly, in the case of BELL VS VOORSITTER VAN OIL R.K.R. 1986 20 AD 678 it was held "*It is clear that our law accepts the rule that where a statutory provision is amended, retrospectively or otherwise, while a matter is pending the rights of the parties to an action in the absence of a contrary intention, must be decided in accordance with the statutory provisions in force at the time of the institution of the action ".*

4.3 In a recent judgment of the Industrial Court of Appeal of Swaziland in the case of HVL ASBESTOS MINE V DAVID SCHOLES - CASE NO. 5/98, the Court stated in relation to Section 112 of the Industrial Relations Act that the transitional provisions of the Industrial Relations Act do not operate so as to retrospectively change the maximum compensation available to an applicant at the time of the institution of the proceedings.

[5] In all the circumstances of this case I am of the considered view that the learned judge of the court *a quo* was correct in his judgment in finding that the Industrial Relations Act of 1996 was applicable to the dispute and not the Industrial Relations Act 1 of 2000.

5.1. In my opinion grounds of appeal No. 2 is also dealt with in the ceasoj3S^r**-.}udgjBefIt3dyan^** appeaLNol- above. The second ground of appeal is that: "*The court erred in finding that the respondents*' *employment were unfairly terminated by the applicant. The court a quo should have found that the reasons for the termination of die respondents*' *employment were fair reasons based on the employers operational requirements,*"

[6] Ground No. 3 reads that: "*the court a quo erred in finding that the retrenchment of the respondents was the worst form of retrenchment that will*

probable come before this court".

6.1. Section 40 of the Employment Act prescribes a peremptory obligation of giving not less than one month's written notice to the Labour Commissioner and to the Union Representatives of the affected employees. Failure to give this statutory notice renders the retrenchment unlawful (see in this regard SMAWU vs SWAZI PAPER MILLS and also ZODWA KINGSLEY AND OTHERS vs SIDC, Appeal Case No. 11/2003.

6.2. The courts (in Section 40 of the Employment Act) are guided by certain guidelines, which prescribe the procedural requirements for a fair retrenchment.

6.3. The I.L.O. Charter also subscribes to the same guidelines and the Charter has been incorporated into our law. (See ZODWA KINGSLEY AMD OTHERS VS SIDC, APPEAL CASE NO. 11/2003 supra).

These guidelines tend to minimize employer and employee tention in the workplace situation. Retrenchment is one of the factors which can have adverse effect on employees.

[7] The court must ascertain as far as it is possible whether the appellant endeavoured to follow these guidelines at all before effecting the retrenchments of the respondents. Some of the guidelines are as follows:

7.1 (a) An employer must consider ways to avoid retrenchments by giving sufficient prior warning to the recognized union of the impending retrenchment.

(b) Consult with the union prior to the retrenchment.

(c) If retrenchment is unavoidable it must be clear form the employer's side that every reasonable steps was taken and that the retrenchment was made in good faith. Counsel for the respondents have referred the court to Rycroft's Guide to SA Law pages 2-33-238.

7.2. (a) The learned judge of the court *a quo* found that appellant gave no warning of the retrenchment to the union or respondents. (The record of proceedings bears this out).

(b) No consultations were conducted prior to the retrenchment.

(c) It would appear that the decision to close down the business and retrench all the respondents was that of the appellant's principal shareholder - Tibiyo Taka Ngwane. The above evidence is supported by the managing director himself in his own evidence. Considering all of the above it cannot be said that the conduct of the appellant rendered the termination of the respondents' services reasonably and substantially fair in the circumstances.

7.3. In so far as the *bona fides* of the appellant goes, the witnesses testified that the closure was "political". The appellant had the onus to explain its extraordinary decision to close down the *national* newspaper virtually overnight.

7.4. Mr. Gule who testified on behalf of the appellant was unable to cast light as to the reasons for the closure of the newspaper. In a letter addressed to Tibiyo Taka Ngwane Mr. Gule stated as follows:

" *The board agreed that all legal procedures with regard to staff redundancy as provided for in the Employment Act and the Industrial Relations Act have been violated*".

[8] Failure to follow the laid down legal procedures may attract heavy penalties with regard to the payment of the terminal benefits as is held in the learned judge's judgment. I therefore can find no misdirection in the finding of the Industrial Court.

[9] The manner in which the appellant treated the respondents was such that the learned judge in the court *a quo* correctly commented that: "*this was the worst form of retrenchment that will probably come before this court*",

It is my considered view that the maximum compensation was fully justified in the circumstances of this particular case. I am further of the view that it would not be proper for this court, sitting as a Court of Appeal, to interfere with the decision of the court *a quo,* since it did not misdirect itself, nor can it be faulted as is contended by the appellant.

[10] The appellant consented to pay the respondents who had been retrenched an

ex-gratia sum. This the appellant did, well knowing that the respondents had reserved their right to seek compensation for any unfair dismissal, should they so wish at the Industrial Court.

10.1. The said *ex-gratia* payments were conducted in such an arbitrary fashion that the Industrial Court was justified to treat it as nonexistent, approaching it on a basis of fair play in the circumstances though it did not specifically spell it or mention it in it's judgment. The court considered that maximum compensation was appropriate to each and every respondent, a conclusion that cannot be faulted.