IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 200/2002**

In the matter between:

BONIFACE DLAMINI **Applicant**

and

SWAZILAND UNITED BAKERIES (PTY) LTD **Respondent**

CORAM:

P. R. DUNSEITH: **PRESIDENT**
JOSIAH YENDE: **MEMBER**
NICHOLAS MANANA: **MEMBER**

FOR APPLICANT: **S. MADZINANE**
FOR RESPONDENT: **N. J. HLOPHE**

J U D G E M E N T -15/05/2007

1. On or about 28 June 2000 the Respondent retrenched about 90 of its employees due to financial difficulties it was experiencing as a result of market shrinkage.

2. The Applicant was one of the retrenched employees. He was employed as a mechanic in the Respondent's workshop at Nhlangano. On 28th June 2000 he was handed a letter signed by the Respondent's general manager informing him that his position had become redundant and that he would work his last shift on that same day. The letter constituted notice of summary termination of the Applicant's contract of employment.

3. The Applicant has applied to the Industrial Court claiming reinstatement to his employment alternatively compensation for unfair dismissal and payment of the balance of terminal benefits. The Applicant alleges that his retrenchment was unfair because:

3.1. he was not consulted nor given proper notice of his retrenchment;

3.2. he was retrenched despite being a permanent and skilled employee, whilst casual, temporary and unskilled employees were retained;

3.2. The Respondent did not comply with the provisions of the Recognition Agreement between itself and the Applicant's representative union regarding retrenchment procedures.

4. The Applicant also alleges that, notwithstanding that he was employed by the Respondent on the 14th February 1992, the Respondent calculated and paid his terminal benefits based upon an incorrect date of employment, namely 13th May 1997.

5. In support of his application to court, the Applicant annexed an amended certificate of unresolved dispute purporting to have been issued by CMAC on 21st February 2002. This certificate lists the issues in dispute as follows:

i) Re-instatement and/or
ii) Payment in lieu of notice
iii) Additional notice
iv) Payment in lieu of leave
v) Severance allowance
vi) maximum compensation for unfair dismissal
vii) Any other competent relief

6. The Respondent in its Reply raised as a point of law that the amended certificate issued by CMAC was subsequently withdrawn and cannot be relied upon by the Applicant. The Respondent avers that the application should be dismissed failing which only the claims for reinstatement and/or compensation for unfair dismissal may be adjudicated upon, since these were certified unresolved in the original certificate issued by CMAC on 10th September 2001. The Respondent avers that the claims for payment of terminal benefits were never conciliated upon nor certified unresolved hence the court cannot take cognizance of these claims.

7. On the merits, the Respondent contends that the Applicant was employed on 13th May 1997, not 14th February 1992, and that he was paid all terminal benefits due to him. The

Respondent denies that the termination of the Applicant's services was unfair and avers that it complied with all requirements of the law and the Recognition Agreement relating to retrenchment.

8. In his Replication on the point of law regarding certification of the unresolved disputes, the Applicant annexed a memorandum of agreement entered into between the Swaziland Manufacturing & Allied Workers Union on behalf of the Applicant and the Respondent on the 16th March 2006 under the supervision of CMAC. The Agreement records the following settlement:

"The parties hereby agree that the amended certificate of unresolved dispute dated the 21st February 2002 is the valid certificate in this matter which will from now on be used to pursue this matter."

9. Although the issue regarding certification of the dispute was raised by the Respondent as a legal point in limine, it could not be determined without hearing oral evidence. The court accordingly referred the application to trial on all the issues raised in the pleadings.

10. Having heard the evidence, it is convenient for the court to address and determine at the outset whether Applicant's claim for payment of the balance of terminal benefits is properly before the court supported by a valid certificate of unresolved dispute.

11. The saga of the certificates is well documented:

11. 1. On 17th July 2001, the Commissioner of Labour granted an extension of the time during which the dispute could be reported, up to the 30th August 2003.

11.2. The Applicant reported a dispute on 27th July 2001. The report states his date of employment as 14 February 1992, and lists all the claims subsequently recorded in the amended certificate dated 21 February 2002 (see paragraph 5 supra).

11.3. On 10th September 2001 CMAC issued a certificate of unresolved dispute listing the issues in dispute as reinstatement and/or maximum compensation for unfair dismissal.

11.4. On 14th December 2001 the union wrote to the Respondent's Human Resources Manager raising the issue that the Applicant was not properly paid his terminal benefits *"due to company records assuming a shorter service than the actual."* The Human Resources Manager replied the same day, stating:

"Kindly note that this issue was resolved during a conciliation meeting held on 16th August 2001."

11.5. On 29th January 2001 the union (SMAWU) wrote to CMAC raising its concern that the certificate had omitted the Applicant's claim for additional notice and severance allowance, which claims were not resolved at conciliation.

11.6. On 21st February 2002 the CMAC Commissioner Sipho Motsa, who is now deceased, issued an amended certificate including the claims recorded in the report of dispute but omitted from the first certificate.

11.7. On 4th March 2002 the Respondent's Human Resources Manager wrote to CMAC complaining that the amended certificate included matters which were not discussed during conciliation and threatening legal action unless the amended certificate be withdrawn.

11.8. The Commissioner called a meeting of the parties on 27th March 2002 at CMAC offices. On the same date he wrote a letter to the union which states as follows:

"Having looked at my record and heard the parties, I hereby cancel the amended unresolved dispute certificate dated the 21st February 2002.

As such, the original unresolved dispute certificate dated the 10th September 2001 subsists and remains the valid certificate."

11.9. On 29th July 2002 the Applicant instituted the present application, attaching the amended certificate. The Respondent filed its Reply raising its objection to the amended certificate on about 20th August 2002. The matter was referred to trial.

11.10. On 17th February 2006, CMAC wrote to the Respondent advising that the Applicant had requested amendment of the certificate, and a new Commissioner had been appointed to hear both parties before a decision to amend could be made. A meeting for this purpose was convened for the 16th March 2006.

11.11. The memorandum of agreement, in terms of which the parties validated the amended certificate, was signed on 16th March 2006 - see paragraph 8 supra.

The agreement was signed by the Human Resources Manager on behalf of the Respondent.

11.12. The Applicant then filed his Replication attaching the memorandum of agreement as evidence of the revalidation of the amended certificate.

12. The Applicant testified that during conciliation at CMAC, all the claims listed in his report of dispute were discussed. The Respondent's Human Resources Manager denied that he was employed in 1992, but said that if he could produce documentary proof she would revise his terminal pay. The conciliation meeting ended on that note, and he was surprised when the Commissioner issued a certificate which omitted the dispute regarding his terminal benefits, since that dispute was not resolved.

13. The Respondent's Human Resources Manager Thandi Dlamini testified that she attended all conciliation meetings in respect of the Applicant's dispute. She said that none of the issues reported by the Applicant were resolved at conciliation. This of course is inconsistent with what she stated in her letter dated 14th December 2001. (See paragraph 11.4 supra). She agreed that the Applicant never conceded at conciliation that he was employed in 1997, not 1992. Asked in cross-examination why the Applicant's claim for additional notice and severance allowance were omitted from the original certificate, she said it was because he was paid all his terminal benefits when he was retrenched. Her answer begs the question, because the benefits paid were calculated using a disputed date of employment.

14. Regarding the agreement validating the amended certificate, Thandi Dlamini said she was "duped" into signing the agreement. She gave no explanation as to how she was duped, but she pointed out that the matter was already in court awaiting allocation of trial dates and the Respondent's attorneys were not informed about the CMAC meeting which resulted in the memorandum of agreement being signed.

15. Having considered all the oral and documentary evidence on the issue, the court makes the following findings:

15.1. the Applicant's claim for payment of the terminal benefits due to him based on 14th February 1992 as his employment date was duly reported and conciliated upon, but was not resolved;

15.2. such claim was omitted in error from the original certificate of unresolved dispute;

15.3. the CMAC Commissioner tried to correct his error by issuing an amended certificate. However he was persuaded that his amendment was irregular because he failed to afford the Respondent an opportunity to be heard regarding the amendment. He then revoked the amended certificate.

15.4. the Applicant supported his application to court with a revoked certificate. Nevertheless the original certificate had been revived and supported his claims for reinstatement and/or compensation, even though it was not annexed to his particulars of claim.

15.5 the memorandum of agreement prima facie re-validated and reinstated the amended certificate, enabling the Applicant to rely on the amended certificate as evidence that all his claim before court had been conciliated upon and certified as unresolved.

16. The Respondent's counsel Mr. Hlophe argued strenuously that the memorandum of agreement is irregular and void because CMAC was functus officio when the agreement was entered into, and also because the Respondent's attorneys did not participate in the discussions leading to the agreement notwithstanding that the case was already in court.

17. On the question of functus officio, section 81 (6) of the Industrial Relations Act 2000 (as amended) provides:

"Notwithstanding the issue of a certificate that the dispute is not resolved, the Commissioner appointed in terms of section 80 (1) retains jurisdiction over the dispute until it is settled."

18. The purpose of this section is to facilitate further efforts to resolve a dispute even after the dispute has been certified as unresolved. If the Commissioner who issued the certificate is deceased or otherwise unavailable, there can be no objection to CMAC appointing another Commissioner to exercise jurisdiction over the dispute. In our view CMAC was not functus officio and the new Commissioner appointed in place of the late Sipho Motsa retained jurisdiction over the dispute and was entitled to engage the parties in discussions to obtain their consent to the reinstatement of the amended certificate - particularly since the amended certificate correctly reflected the unresolved issue in dispute.

19. Was the revival of the amended certificate invalid because the Respondent's attorneys were not involved? The court notes that the Respondent's Human Resources Manager was given one months notice of the meeting at CMAC to discuss the issue. She had ample time to

consult with the Respondent's attorneys, or to arrange their attendance at the meeting. She must have been aware that the case was pending in court, and that the purpose of the meeting at CMAC was to make representations regarding amendment of the certificate which defined the issues in dispute. The court infers that the Respondent deliberately refrained from involving its attorneys.

A party has no right to be represented by a legal practitioner in conciliation proceedings - see section 81 (4) of the Industrial Relations Act 2000 (as amended). There is no evidence that CMAC had any knowledge of the status of the case in court or the identity of the Respondent's attorney. CMAC correctly addressed its invitation to the meeting to the Respondent as principal and interested party, and it was incumbent on the Respondent to inform its attorneys.

Professional courtesy and ethics may dictate that the Applicant's attorneys should have copied their correspondence with CMAC to the Respondent's attorneys, since the case was already pending in court. We do not however consider that this vitiates the agreement voluntarily entered into by the Respondent's Human Resources Manager.

64. Despite Thandi Dlamini's allegation that she was tricked into signing the agreement, there is no evidence that she was unduly coerced or influenced to sign, or that she was induced to sign by some form of misrepresentation. The Applicant's attorneys were not present at the meeting, and the demeanor of Thandi Dlamini in the witness box is not that of a person who can be coerced against her will. The court concludes that Thandi signed the agreement because she believed that the amended certificate correctly recorded the disputes that remained unresolved after conciliation. That her decision to sign may have provoked censure from the Respondent's attorney does not render the agreement any less effective.

65. The court holds that the Applicant's claims are properly before the court.

66. Another legal issue was argued by the Respondent's counsel in his closing submissions, namely that the Applicant compromised his rights by accepting payment of his retrenchment package in full and final settlement. Respondent's counsel argues that Applicant is precluded from advancing any further claims arising from the termination of his employment in view of this compromise.

25. Respondent's counsel referred the court to Exhibit "R9", which is a breakdown of the "Retrenchment Package" paid to the Applicant

pursuant to his retrenchment. The document concludes with this condition:

"The undersigned hereby accept the Retrenchment package as detailed above as full and final settlement."

Below this condition is the signature of the Applicant and the date 10 August 2000.

The Applicant testified that he initially refused to accept his terminal benefits subject to the condition attached. He was later informed by the union that the Respondent had agreed to waive the condition and he could accept payment without compromising his further claims. This evidence was corroborated by Ephraim Dlamini, former Secretary-General of the union at the time of the retrenchment, who said he personally attended a meeting after the retrenchment at which the Respondent agreed to waive the 'full and final settlement' condition.

The Respondent's Human Resources manager Thandi Dlamini denied the alleged agreement of waiver. The Respondent's workshop manager Timothy Khumalo was alleged by Ephraim Dlamini to have attended the meeting at which the waiver agreement was reached. He was called to testify by the Respondent, but he was never asked about the waiver and accordingly never denied the evidence of Ephraim Dlamini.

A plea of compromise raises a substantive defence that, if successful, would have the effect of extinguishing the Applicant's claim entirely. Yet this defence was not pleaded by the Respondent in its Reply, and was raised for the first time during the cross-examination of the Applicant. No application has been made to amend the Reply, and as matters stand the issue is not strictly speaking before the court for decision. To make a determination on a substantive issue which the Applicant was never called upon to address could be potentially prejudicial to the Applicant. On this ground alone the court would be justified in disregarding the unpleaded defence. Nevertheless we are satisfied that in any event the defence cannot stand on the evidence:

28.1 The Applicant impressed the court as an astute man, though relatively uneducated, who was unlikely to have knowingly compromised claims which he had already advanced. He was a credible witness who testified in a forthright and honest manner. He was not shaken under cross-examination.

28.2 We cannot say the same for Ephraim Dlamini, whose evidence on other issues was shown to be false (see *infra).* Yet on the issue of the compromise his evidence was detailed, unshaken and convincing.

28.3 Thandi Dlamini, whilst on the whole a credible and apparently truthful witness, did strike the court as unduly partisan to the Respondent's cause. Her dismissive denial of the waiver agreement at a post-retrenchment meeting was not corroborated by Khumalo.

28.4 The failure of the Respondent to plead the compromise defence at the outset tends to support the Applicant's version that the condition was waived, and suggests that the present argument is something of a legal afterthought.

28.5 A significant piece of real evidence corroborating the Applicant's testimony is that he only signed for the retrenchment package on the 10th August 2000, some ten days after it was first presented to him. According to Applicant, the delay was caused by the union arguing for removal of the 'full and final settlement' condition from the retrenchment package receipt. Thandi Dlamini could not give any other explanation for the delay.

The Respondent's counsel conceded in argument that all the benefits listed in the Retrenchment Package exhibit R9, including the pro rata bonus, are benefits to which all retrenched employees are entitled in terms of the Recognition Agreement. The Retrenchment Package contains no ex-gratia or additional benefits which might constitute a quid pro quo for the Applicant compromising his rights by abandoning all further claims he might have against the Respondent

In Paper, Printing, Wood & Allied Workers Union & others v Delma (Pty) Ltd (1989) 10 ILJ 424 (IC), the court held that:

"The acceptance by an applicant of an amount tendered by the respondent 'in full and final settlement' of a claim does not preclude the applicant from approaching the industrial court for relief in terms of s 43 of the Labour Relations Act. While a civil claim in a court of law may well have been compromised in these circumstances, an applicant is none the less entitled to question the fairness of a respondent's behaviour before the industrial court."

In the view of this court, it is an unfair labour practice for an employer to withhold payment of terminal benefits, for which the employer acknowledges itself to be liable and to which the employer is unequivocally entitled, until the employee agrees to accept such benefits in full

and final settlement. Obtaining assent to a compromise in this manner verges on extortion and will not be countenanced by the court.

For all the above reasons the court holds that the Applicant is not precluded by his signature of the retrenchment package receipt from pursuing the claims which are before the court.

Turning to the merits of the application and the question whether the Applicant was fairly retrenched, the court has no hesitation in finding that the Respondent had a bona fide economic rationale for implementing the retrenchments in June 2000. The Respondent's bread sales had declined in volume by 130000 units per week, largely due to new competition in the market, and unsustainable financial loss was being incurred. A restructuring exercise to reduce expenses was required, and loss of jobs was inevitable.

In terms of the Recognition Agreement, the Respondent retained its right to plan, organize and manage its affairs and to make decisions on business policy issues, including retrenchment of employees, subject however to its duty to comply with the law and to consult with the union.

The Recognition Agreement requires the Respondent to consult with the union concerning retrenchment procedures to be followed; the reasons for the retrenchment; the numbers of employees involved; the timing of the retrenchment programme; and the names and remuneration of employees to be retrenched.

The Recognition Agreement sets out in detail the principles and criteria to be applied to select workers for retrenchment. We will revert to these principles and criteria at a later stage in this judgement.

The Retrenchment Procedure under the Recognition Agreement also provides for a lay-off prior to retrenchment, in the following terms:

> *"The company agrees that all retrenched workers will be, prior to their retrenchment, layed off without pay for* a *period not exceeding one (1) month."*

35. When the Applicant testified, he had three principal complaints regarding his retrenchment:

67. he had not been personally consulted nor given proper notice that he was selected for redundancy, prior to his retrenchment;

68. upon a proper application of. the selection criteria, he should not have

been retrenched. Moreover the Respondent used the wrong date of employment when selecting him for retrenchment and in paying his terminal benefits;

69. there was no lay-off of workers prior to his retrenchment, as required by the Recognition Agreement.

CONSULTATION

36. The Applicant testified that he was aware of the consultations between the Respondent and the union regarding a contemplated retrenchment exercise. He went on study leave to upgrade his Grade 2 mechanic certificate to Grade 1. On his return to work his workshop manager asked him if he wanted to take a voluntary exit package. He declined.

On the 28th June 2000 at 7.30 p.m. he was given his retrenchment letter and informed that after completing his shift his employment by the Respondent was terminated. This was his first and only notification that he had been made redundant. He wrote a letter of grievance which was faxed on 29th June 2000, alleging that he was unfairly selected for retrenchment. In particular, he complained that he was made redundant whilst unskilled and unqualified colleagues in the workshop department remained in employment. He never got a reply to his grievance letter. He went to see the Respondent's Human Resources Manager Thandi Dlamini. She referred him to the union shop stewards at Nhlangano. The shop stewards told him to report a dispute at the Labour office. Under cross-examination, the Applicant agreed that the union had been in consultation with the Respondent regarding the retrenchments for more than one month before he received his retrenchment letter.

70. The Applicant's witness Ephraim Dlamini testified that he was the Secretary-General of the union SMAWU at the time of the retrenchment. Dlamini contradicted the Applicant and testified that there were never any consultations between the Respondent and the union. He stated specifically that between 25 May - 28 June 2000 there were no meetings held.

71. Dlamini also testified that the statutory notice of retrenchment issued to the Labour Commissioner by the Respondent did not comply with section 40 of the Employment Act 1980 because it never stated the number of the affected

employees, their posts and remuneration, nor gave reasons for the redundancies.

72. Dlamini's evidence regarding the absence of consultations, along with his credibility as a witness, was annihilated when the Respondent called its Human Resources Manager Thandi Dlamini to the stand. Thandi produced minutes of consultation meetings held on 26th May, 2nd June, 9th June, 16th June and 23rd June 2006. All minutes disclose extensive discussion on the rationalization and restructuring of SUB and the retrenchment of its employees. The union was given the opportunity to consult on the timetable for the retrenchments, and the implementation of the procedures and principles agreed in terms of the Recognition Agreement. The union was also given the opportunity to propose ways to avoid or minimize the redundancies. Their response was perverse, namely that workers should be given a 25% wages increase. The court finds that the Respondent complied with its duty to consult with the union regarding the decision to retrench and the process to be followed.

73. The court takes an extremely dim view of a former union official (who currently practices as a Labour consultant and frequently appears before the court as the representative of litigants) giving blatantly false and misleading evidence under oath. Although Ephraim Dlamini is not recorded as having personally attended the five minuted consultation meetings, the union was in every case represented by its officer Leonard Dlamini, and it is inconceivable that Ephraim Dlamini as Secretary-General was not aware of, and fully briefed about these important meetings. His evidence that no consultations took place is dismissed as outright chicanery.

74. Likewise, his evidence about the section 40 statutory notice is lacking in veracity. All relevant information is contained in the notice. Dlamini was forced to admit this under cross-examination.

75. Fortunately for the Applicant, he did not participate in his witness' attempt to deceive the court. He never alleged that the Respondent failed to consult with the union. His complaint is that he was only notified that he was selected for redundancy a matter of hours before the retrenchment took effect, and he was never personally consulted about his retrenchment.

In their book **A Guide to SA Labour Law, Rycroft & Jordaan** state at page 238:

"In additional to general consultation with worker representatives, there may be a need for individual consultation. 'The more vague and subjective the criterion adopted for redundancy selection, the more powerful is the need for the employee to be given an opportunity of personal consultation before he is judged by it' (Media Workers Association of SA v SABC (1986) 7 ILJ 754 (IC) at 762H)."

Moreover, the general application of objective criteria for redundancy selection may give rise to unfairness where the special circumstances of an individual employee are not taken into account. For example, it

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might be unfair to apply the LIFA criterion to a disabled worker who ^

has been given sheltered employment after a work accident. Also, the criteria might be wrongly applied to a particular worker due to erroneous company records e.g. an incorrectly recorded date of birth, or employment date.

It is not necessary that each and every employee earmarked for redundancy must be individually consulted before his retrenchment, but employees selected for redundancy must be afforded the opportunity to make special representations regarding their individual circumstances, should they so wish. Such representations may be made through the representative union or by the employee himself.

In **SA Commercial, Catering & Allied Workers Union and 4 Others v Alberton Hotel (1997) 2 LLD 124 (LAC)** the SA Labour Appeal

Court said that the purpose of such individual consultation is to enable *"each individual to make representations as regards the method of selection and the applicability or otherwise to (him or) herself. The individual could use the opportunity to motivate for choice of different retrenchment selection criteria to those proposed by the appellant. The individual could challenge the appellant's prima facie view that this individual employee fell within the ambit of such selection. The individual could even argue in favour of (his or) her own retention as an employee whilst suggesting that another employee's work record, productivity, personal circumstances or length of service justified retrenchment in (his or) her stead."*

In **The New Labour Law (Brassey et al) at page 286,** Halton Cheadle outlines the retrenchment guidelines recommended to promote sound labour relations. One of the well-established guidelines is that the employer must give sufficient prior notification to the employee selected for retrenchment, (c.f. **Rycroft & Jordaan op. cit. at p. 234).** At page 296 Cheadle distinguishes this notification from the requirement to give notice to the representative union:

"This notification takes place after the decision to retrench has been made and after

application of the selection criteria. The notification has two primary purposes, the first of which is to give the employee an opportunity to contact his union should there be special representations that ought to be made on his behalf, or to make such representations himself, should there be no union. Secondly, the notification should be such as to permit the employee as much time as possible to look for alternative employment. 'Sufficient' prior warning should be such as to give the employee ample opportunity to arrange his affairs and to seek alternative employment. "

In the case of **Govender & Others** v **Nugshoe (1993) 2 LCD 59 (IC),** the SA Industrial Court found a retrenchment unfair because the individual employees, as distinguished from the union, had received no advance notice of the retrenchment and were given no opportunity to consider the selection criteria applied to them or to make representations in regard thereto. The court held that where a criterion is applied objectively, there is a need for the employee to be given an opportunity of personal consultation before being judged by that criterion.

We are in respectful agreement with this decision, which is consistent with fairness and equity in labour relations.

In the case a quo, it is common cause that the Applicant was given only a few hours notice of his retrenchment. He was given no opportunity to make representations regarding the appropriateness of his selection for redundancy.

The Recognition Agreement provides that, after laying off casual and temporary employees, pensioners and voluntary retirees, "fhe *principle of last in, first out (UFO) wherever practical and possible, will be applied within job categories and skills."*

During the trial, the Applicant pointed to a fellow mechanic Paddy Stanley who had been retained at the Nhlangano workshop. The Applicant alleged that he was employed before Stanley, and that he was better qualified than Stanley. The court will deal with these allegations later in this judgement. Suffice it to say that the Applicant should have been given the chance to challenge his selection for redundancy and to argue that Stanley should be retrenched in his stead. Having been denied such an opportunity, the Applicant was compelled to raise a grievance after the termination of his services, but even this attempt to secure a hearing was ignored and the Applicant's follow-up with Thandi Dlamini likewise received short shrift.

76. Thandi conceded that if the Applicant had disputed the date of his employment before his retrenchment, she would have scrutinized his personal file and if the records revealed he was employed prior to Stanley he would not have been retrenched.

77. Thandi Dlamini asserts that she has now checked the records and the Applicant was not employed prior to Stanley. The point however is that, whatever the outcome of personal consultation with the Applicant prior to termination of his services might have been, it was procedurally unfair to deny the Applicant such consultation and the opportunity to argue for the retention of his job.

78. Furthermore, the Recognition Agreement provides that *"long-service and/or skilled employees will whenever possible and practical be accommodated elsewhere in the company."* The Respondent was required to consult with the Applicant, as a skilled employee, as to his possible accommodation elsewhere in the company, even if this involved a demotion or decrease in remuneration. Not only was such consultation rendered impossible by the short retrenchment notice given to the Applicant, but there is no evidence that the Respondent ever applied its mind to accommodating the Applicant elsewhere.

SELECTION OF APPLICANT FOR RETRENCHMENT

55. The Applicant testified that two casual workers were retained at the Nhlangano workshop after his retrenchment, contrary to the criteria set out in the Recognition Agreement. Thandi Dlamini explained that these casuals were on short fixed term contracts and they were permitted to complete their contracts, after which their services were discontinued.

The Labour Appeal Court in South Africa has held that an employer that retrenches an employee on a fixed-term contract before the contract's expiry date commits a breach of contract - see **Buthelezi v Municipal Demarcation Board (2004) 25 ILJ 2317 (LAC).** This decision is clearly correct, and the Respondent cannot be faulted for honouring the contracts of its casuals, notwithstanding the provision in the Recognition Agreement that casuals should be retrenched before permanent workers.

The Applicant also complained that after his retrenchment he found a temporary employee Dylan Quintas working in the workshop. The workshop manager Khumalo explained that Quintas was never employed by the Respondent, but he was occasionally contracted for

specific mechanical work in the workshop, and this occurred even before the Applicant's retrenchment. This explanation is a full answer to the Applicant's complaint about Quintas, since there is no reason why the Respondent cannot continue to outsource specific work as it did before.

Of more substance is the Applicant's allegation that a certain Paddy Stanley, a mechanic at the Nhlangano workshop, should have been retrenched instead of him. According to the Applicant, Paddy Stanley was employed after him, and Stanley has no qualifications at all. The Applicant said that he was employed in 1992 and Stanley in 1993. Stanley worked as his assistant and carried his toolbox.

59. It was put to the Applicant in cross-examination that there were two factors that caused Stanley to be retained instead of the Applicant:

59.1. the Applicant was employed in 1997, not 1992, therefore Stanley was employed before him; and

59.2 Stanley had a mechanics grade 1 certificate, therefore hewas more skilled than the Applicant.

The Applicant vehemently denied both these allegations.

60. The Respondent's Human Resources Manager conceded in her evidence that if it was true that the Applicant was employed in 1992, and not in 1997 as alleged by the company, then he should not have been retrenched.

61. As previously stated, the Recognition Agreement provides that LIFO will be applied, wherever practical and possible, *'within job categories and skills'.* This means that where a number of workers performing the same jobs or possessing the same skills are to be made redundant, selection will be based on the principle of 'last in, first out'. The Agreement does not stipulate that LIFO will be applied within departments or branches, so it must be applied within job categories and skills across the entire company. (See **GENERAL FOOD INDUSTRIES LTD t/a BLUE RIBBON BAKERIES v FOOD & ALLIED WORKERS UNION & OTHERS (2004) 25 ILJ 1655 (LAC))**

62. The minutes of the consultation meeting on 9th June 2000 record that management selected the proposed redundant positions by looking at each department with the heads of department. This was not a correct application of the LIFO principle recorded in the Recognition Agreement. The Applicant was entitled to compete for retention of his job against

all the grade 2 mechanics in all the Respondent's workshop departments in Swaziland, not only within the workshop at Nhlangano.

63. In the minutes of 9 June 2000, it was proposed that 4 workers from the workshop at Matsapha be retrenched out of a total complement of 22 workers. It was proposed to retrench only one person at Nhlangano. We do not know whether these proposals were effected. The court was not furnished with any details or breakdown of the actual number and description of positions made redundant. We were not told how many mechanics in the workshop department were retrenched, nor given any indication of their respective qualifications.The Applicant's counsel made no attempt to elicit this important information. It is not possible on the evidence available for the court to make a proper determination whether the Applicant was prejudiced by the improper application of the LIFO principle on a departmental basis. In the circumstances, the court will only examine the fairness of the Applicant's redundancy vis a vis the position of Paddy Stanley.

64. Although the Respondent's counsel put it to the Applicant that Stanley had a grade 1 qualification, the workshop manager said in evidence that Stanley had a grade 2 qualification. We accept this evidence, since the workshop manager is best placed to know the qualifications of his mechanics. Since Stanley had the same qualification as that of the Applicant at the date of redundancy, the application of LIFO within job categories and skills dictates that whoever was last employed between Applicant and Stanley should have been retrenched. It is accordingly necessary for the court to determine the Applicant's date of employment.

65. The Applicant testified that he first commenced working for the Respondent on the 14th February 1992. He said he worked under three consecutive temporary written contracts of one month each, but on expiry of the third contract he continued working without signing any further contract. He worked continuously for the Respondent without any break in service from 14th February 1992 to the date of his retrenchment, namely 28th June 2000. On 9th July 1997 he signed a written contract. The contract states, inter alia: We *confirm your starting date with the company which was on 13-05- 97. We have pleasure in offering you the position of GRADE 2 MECHANIC in the workshop department."*
The Applicant signed this letter, stating that he understood and agreed to the terms and conditions of employment set out therein.

66. Asked why he signed a letter of appointment which incorrectly recorded his date of employment, the Applicant replied that he raised this issue and was reassured that the letter

was merely confirming him. He agreed that the document says nothing about confirmation but is an offer of appointment.

67. It was put to the Applicant that between 1992 and 1997, he worked sporadically for the company as and when work was available, and always for less than a month at a time. It was also put to him that the 1997 contract was signed because the Respondent decided to employ him permanently. The Applicant denied all of this and insisted that there was never any break in his service after 14th February 1992, except when he took annual leave.

68. The Respondent's workshop manager Timothy Khumalo said he could not remember when the Applicant was employed. Thandi Dlamini testified that she was appointed as Human Resources Manager in March 1997. She said that in May 1997 she was made aware that the Applicant was a contract employee. She then prepared the letter dated 9th July 1997 to appoint him as a permanent employee.

In chief, Thandi said that prior to 13 May 1997 the Applicant was working by the month on a contractual basis as and when jobs were available. In cross-examination, however, she qualified this to say that she could not comment on the Applicant's position prior to March 1997 when she became Human Resources Manager. Despite this qualification, she later reverted to insist that the Applicant had worked on a contract basis between 1992 and 1997, and she produced a pro forma Temporary Labour Contract' which she said was the form of the contracts signed by the Applicant. Asked if she had the actual contracts signed by the Applicant, she replied, *"Not with* me."The trial was adjourned during the course of Thandi's evidence to enable her to obtain other documents that she wished to refer to. It must have been apparent to both Thandi and the Respondent's counsel that these contracts, if they existed, were material evidence central to the Respondent's allegation that the Applicant only worked on contract as and when required, prior to 1997. Nevertheless, no contracts were produced in evidence by the Respondent, nor was any reason ever advanced why such contracts could not be produced. In such circumstances, little weight can be attached to Thandi Dlamini's bald assertions regarding the position before March 1997..

69. Thandi said the Applicant worked as and when jobs were available. She did not say that the Applicant's contractual service since 1992 was not continuous. Since Thandi admitted to having no personal knowledge of Applicant's work situation prior to March 1997, her assertion that the Applicant worked 'as and when required' must be based on company records. Wages and/or clocking registers showing the Applicant's attendance at work prior to 1997 should be available. Yet no such records were produced by the Respondent.

70. The Applicant's forceful insistence on oath that he worked continuously from 1992, without contracts after the first three months, stands against Thandi Dlamini's faint claim to an *'awareness'* of sporadic contracts - which she failed to verify by producing the source of her awareness: the contracts and company records.

71. The Applicant bolstered his evidence further by producing a statement of account issued by the Swaziland National Provident Fund. The statement is issued on the 4th April 2002 and reflects the Applicant's name and details. The statement records that from the end of April 1992, monthly contributions were paid to the Fund on account of the Applicant by employer number 11112991. The Applicant produced an SNPF member statement which indicates that the said employer number belongs to the Respondent.

72. Respondent's counsel objected to the admission of the statement of account because the information contained therein is hearsay. He agreed to the statement being exhibited only on the basis that the statement is a printout which the Applicant alleges he obtained from the SNPF. Section 11(1) of the Industrial Relations Act 2000 provides that the Industrial Court shall not be strictly bound by the rules of evidence which apply in civil proceedings. The court is of the view that the statement may safely be admitted to prove that the Respondent's contributions for the Applicant commenced at the end of the third month of his employment. The statement furnishes a measure of corroboration of the Applicant's version that he worked three months of contractual employment and he was thereafter treated as a permanent employee of the Respondent.

73. For all the above reasons, the court finds that the Applicant has proved on a balance of probabilities that he was employed on the 14th February 1992, and that he was in the continuous employ of the Respondent without break in service until his retrenchment on the 28th June 2000, It is not necessary for the court to dwell much on the legal effect of the letter of appointment dated 9th July 1997. On Thandi Dlamini's own evidence she found the Applicant already working for the Respondent in March 1997, so the purported starting date of 13th May 1997 inserted in the letter of appointment was clearly artificial. At best for the Respondent, the letter was a bona fide but misguided attempt to regularize the Applicant's employment, which had been allowed to run on without proper documentation since 1992, but it did not interrupt the Applicant's continuous employment.

74. It is common cause that Paddy Stanley was employed in 1993, after the Applicant. According to the LIFO principle he should have been selected for redundancy in the Applicant's stead. In the premises the retrenchment of the Applicant was substantively unfair.

LAY-OFF OF WORKERS

75. The Recognition Agreement provides that all retrenched workers will be, prior to their retrenchment, layed off without pay for a period not exceeding one month. We believe that this provision was agreed by the Respondent and the union to allow the Respondent a breathing space of one month to recover from a downturn in business or some other economic setback, with the hope that the retrenchment might thereby be avoided. This provision involves a sacrifice by the workers of their paid employment for one month as a possible means to save their jobs in the long run. Presumably the lay-off would have the additional benefit of advance notification to the workers selected for retrenchment, giving them the opportunity to seek alternative employment, and also enable the Respondent during the lay-off to reconsider its selection of the workers to be retrenched. It is accordingly a provision included in the retrenchment procedure for the benefit of both employer and employees.

76. The court finds that the Respondent was not entitled to simply ignore the agreed lay off provision. If the Respondent felt that the lay off would achieve no practical advantage for itself or the workers, then it should have actively engaged in negotiations with the union to the end that the condition be waived. Non-compliance with the condition after negotiation to impasse might be condoned, but not a unilateral repudiation without any attempt at negotiation. To this extent also, the court finds that the retrenchment exercise was procedurally unfair.

77. In the result, the court has found that the termination of the Applicant's employment on grounds of redundancy was substantively and procedurally unfair. The court also finds that the calculation of the Applicant's terminal benefits was based on an incorrect date of employment.

78. The Applicant has claimed reinstatement or re-engagement. He is entitled to this relief unless the Respondent can show that the circumstances surrounding his dismissal are such that a continued employment relationship would be intolerable, or that it is not reasonably practicable for the Applicant to be reinstated or re-engaged - see section 16(2) of the Industrial Relations Act 2000. All that Thandi Dlamini said in this regard was that it would not be possible to reinstate the Applicant because recently there had been further retrenchments in the workshop. She gave no details as to the reason for the recent retrenchments, whether any mechanics were retrenched, and whether such retrenchments would have impacted on the Applicant had he not been retrenched in 2000. There is no evidence that Paddy Stanley has left the Respondent's employ, and if he is still in employment, then the Applicant is certainly also entitled to be in the Respondent's employ.

79. Although a period of 7 years has elapsed since the Applicant's retrenchment, this delay cannot be ascribed to any fault or unreasonable conduct on the part of the Applicant, and the court can see no reason why the Applicant should not be entitled to the same relief he would have obtained if his matter had come to trial more expeditiously. Nevertheless, it would be unduly onerous on the Respondent to order reinstatement of the Applicant from the date of his retrenchment, since this would involve payment of 7 years arrear wages. After careful deliberation, the court has decided to make the following order:

(a) The Respondent is ordered to re-engage the Applicant as a mechanic on the same terms as those applicable to mechanics in its employ with equivalent qualifications and experience, with effect from 1st June 2006;

(b) The Applicant will report at the Respondent's head office on 1st June 2007 to be assigned his duty station;

(c) The Respondent will pay the Applicant his arrear wages for the 12 months from 1st June 2006 to 31st May 2007 by no later than the 7th June 2007;
(d) The Respondent will forthwith pay the Applicant the following amounts in respect of the balance of his terminal benefits:
Balance of additional notice E 3233.20
Balance of severance allowance 8083.00
E11316.20

80. On the question of costs, the court notes that the trial was considerably prolonged by evidence on the issue whether consultations took place between the Respondent and the

union. This issue was unnecessarily introduced into the case by the vexatious testimony of the Applicant's witness, and it is fair that the Applicant should be deprived of half of his costs to reflect the wasted court time and the disapproval of the court.

The Respondent is accordingly ordered to pay half the costs of the application.

The members agree.

PR DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT