IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 8/2007

SMALL ENTERPRISE DEVELOPMENT COMPANY Appellant

And

PHYLLIS PHUMZILE NTSHALINTSHALI Respondent

Coram BAND A, JP

MAPHALALA, JA et

MAMBA, JA

For the Appellant MR. N. HLOPHE

For the Respondent MR. Z. JELE

JUDGMENT
26th June 2008

Maphalala J:

[1] On the 16th August 2007, Nkonyane J of the Industrial Court granted an order in favour of the present Respondent in the following terms where the present appellant was the Respondent and the present Respondent was the Applicant:

> **(a) The Respondent is ordered to reinstate the Applicant to her position as Personnel Officer with effect from 1st December 2003, with full restoration of seniority, length of service and benefits.**
> **(b) The Respondent is ordered to pay to the Applicant the sum of E69, 347-25 in respect of the balance of arrear remuneration after refund of terminal benefits.**
> **(c) The Respondent is ordered to its Pension Fund for the credit of the Applicant the employer contributions for the period from 1st December 2003 to the date of reinstatement, and to procure that the Applicant is credited with all employer contributions paid to the Fund on her behalf prior to 1st December 2003 together with accrued interest to date.**
> **(d) The Respondent is ordered to pay the costs of the suit.**

[2] The Appellant being dissatisfied with the above order has filed before this court an appeal on the following grounds:

> **1. The court *a quo* erred in law in finding that the termination of Applicant's (now Respondent's) services was unfair both substantively and procedural in as much as:-The position of the Applicant was abolished following the employer's prerogative to structure its operatives the best way it wanted to and remains abolished to-date; The Applicant (now Respondent) frustrated meaningful consultation with the Appellant, by refusing to take part in it notwithstanding various persuasion until very late in the day; Alternatively to 1.2 above the award ought to have reflected that the Applicant was responsible for the failure to hold a meaningful consultation with the Appellant.**
>
> **2. The court *a quo* erred in law in finding that the termination of Applicant's services was an automatically unfair termination in as much as:-**
> **This was not reported as a dispute with the Commission for Mediation Arbitration and Conciliation and was therefore not conciliated upon. The court was therefore precluded from taking cognizance of it as for any issue to be taken cognizance of, same ought to be first conciliated upon.**
> **Same was not a remedy asked for by the Applicant nor was the court ever addressed on it during the hearing of the matter.**
>
> **As concerns such a relief, Appellant has been treated unfairly in as much as he had not been made**

aware of the case he had to meet as required by the law, which should have risen from the papers.

3. Having acknowledged that it was the employer's prerogative to structure its establishment in the manner most suitable for its requirements, the court a quo erred in law in finding that the restructuring of Applicant's establishment leading to the termination of Respondent's services was inappropriate because:-

The Applicant's (now respondent's) post was abolished and remains abolished; The employee was not treated unfairly as she was paid all her terminal benefits and pension dues pursuant to the restructuring.

Her reinstatement to a non-existent position amounts to usurpation of the employer's prerogative on running of its business by the court.

4. The court *a quo* erred in law in directing that the Appellant reinstates the Respondent in as much as there was clear and uncontroverted evidence that:-

Reinstatement of the Applicant was not possible in as much as her position no longer exists, pursuant to the employer's prerogative to structure its operations the way it considers best.

Reinstatement was not reasonably practicable in the circumstances of the matter. The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.

The directive by the court amounts to usurpation of and/or substitution of the employer's prerogative with that viewed by the court as appropriate for the employer.

5. The court *a quo* erred in law in substituting a structure observed by it as appropriate for the employer in the stead of the one established by the employer in exercise of his prerogative to run his business the was he considers best.

6. The court *a quo* erred in law in its analysis of the evidence before it, leading to it failing to appreciate that meaningful consultation on all the aspects of the subsequent retrenchment was frustrated by the Applicant herself when she refused to be consulted until the very last moment of the consultation period.

7. The court *a quo* erred in law in ordering that the Applicant be remunerated for a period of 30 months together with reinstatement in as much as that remuneration in the case of a reinstatement ought not to exceed the period of compensation conceived by the Act in the case of an unfair dismissal.

8. The court *a quo* erred in law in that it took into account extraneous considerations not supported by

the evidence before it, which considerations had a bearing on the award and judgment reached by it as evidenced by its comment not supported by the evidence that:-

The Applicant's post had been established in response to the need for specialized handling and coordination of human resource and Industrial Relations functions. The Applicant's job description reveals important duties and functions vital to the efficient operation of the Respondent and the welfare and development of its employees, yet no such job description was handed in as evidence in court.

The Applicant's salary was not onerous yet neither the income of Appellant not its pay- roll was ever tendered as evidence for the court to be able to assess the impact of such salary on the overall.

9. The court *a quo* erred in law in not ordering the Applicant (Respondent) to return the monies paid to her as pension if she is being re-instated with retrospective effect in as much as the end result is that she has to be paid two pension benefits which is unfair to the employer.

[3] It is imperative to recount the factual background of the matter for a better understanding of the issues before this court. The Respondent was employed by the appellant in 1978 and she was in continuous service of the Appellant for a period of twenty-five years thereafter. On the 31st October 2003, as she was knocking off from work, the Respondent was handed a letter which came as a surprise to her. The letter is signed by the Managing Director and reads as follows:

"NOTICE OF ABOLISHMENT OF YOUR POST AS A RESULT OF RESTRUCTURING.

1. Kindly note that The Small Enterprises Development Company Limited has decided to restructure its operations as a result of which your post is adversely affected in that it has to be abolished with its present functions being allocated to the other posts. This shall regrettably lead to your services being terminated with this undertaking.

2. The said restructuring shall take effect on or about the 30th November 2003. You are therefore called upon to attend a consultation meeting with me on the 12th November 2003 at my office at 9.30am, in the forenoon to discuss this matter.

3. Kindly take note that at termination, you are entitled to be paid a statutory terminal package as follows:

(a) I month notice

(b) Additional notice (being 4 days of each year x number of years worked less the first year x

the daily rate).

(c) Severance allowance (being 10 days of each year x number of years worked less the first year x the daily rate).

(d) Outstanding leave days x the daily rate.

4. Depending on the negotiations the company is also prepared to offer a conditional package which would not disregard the first year on both the severance allowance and additional notice together with an additional month salary provided it is taken in full and final settlement of all and any issues arising from your employment by SEDCO.

5. I am otherwise prepared to hear you on any issues you wish to raise during such consultation.

6. I trust in your cooperation"

[4] The Respondent stated in the court *a quo* that she was taken aback by this letter because she was the Appellant's personnel officer yet she was not aware of any restructuring of operations, nor had she been given any restructuring that her post was abolished. Respondent lost no time in responding to this letter, stating that she was not willing to attend a consultation meeting because the decision to abolish her post and terminate her services had already been taken and consultation after the event would be merely "window dressing". She accused the Appellant of victimizing her because she had reported a dispute concerning stoppage of her annual salary increment to the Labour Commission.

[5] The Managing Director replied giving reasons for the restructuring and denying any victimization. Further correspondence passed between the parties. The Appellant extended the date for the consultation meeting to 21st November 2003, and urged the Respondent to attend. Respondent agreed to attend the meeting but requested certain documents to enable her to participate meaningfully. She requested the following:

•The intended structure and rationale for restructuring;

•The framework for the re-distribution of her duties and functions;

•Projections for the future regarding job creation; and

•The Appellant's audited financial statements.

[6] On the 21 November 2003, the parties agreed to reschedule the meeting for 30 November 2003. The Managing Director then furnished the requested information in the following terms:

> **"1. The intended structure will be the one you know, with the exception that the position of personnel Officer has been removed and a new position of Chief of Operations has been created as assisting to the Managing Director.**
> **2. The distribution of your work will be such that what is purely personnel work will be transferred to the Finance and Administration Department and the rest to the legal Affairs/Board Secretariat.**
> **3. To the best of my knowledge there are no new positions likely to be created in this case since this is not a retrenchment but an abolishment of your position die to restructuring".**

[7] The Respondent was not satisfied with the information provided. She wrote again requesting for the intended new structure and the financial statements. She stressed that she was attending the schedule meeting for purposes of consulting on ways and means of avoiding her retrenchment only. From the Minutes of the meeting on the 30th November 2003, it is apparent that the parties disagreed from the onset regarding the purpose and agenda of the meeting. The Managing Director wished to discuss the Applicant's termination package. The Respondent insisted that they discuss how the decision to restructure was arrived at and why her post was abolished. She demanded the financial statements to enable her to properly discuss these issues, which she said must be discussed prior to negotiation of a package.

[8] The Managing Director explained at the meeting that the decision to abolish the Respondent's post had been taken by the Board of Directors of the Appellant and management intended to implement the Board's decision. If the Applicant was not prepared to negotiate a package, the meeting should end. The meeting ended without any proper consultations. Three days later on the 3rd December 2003, the Respondent was notified by letter that her services were terminated "as of 30th November 2003" she was informed that she would be paid her statutory benefits. Respondent reported a dispute to the Conciliation, Mediation and Arbitration Commission. The dispute could not be resolved through conciliation. The Respondent then applied to the Industrial Court, claiming reinstatement alternatively compensation for unfair dismissal. A further claim in respect of pension contributions fell away because it was settled in the meantime.

[9] In its judgment, the court *a quo* made a finding that the abolishment of the Respondent's

position and the subsequent termination of her services was procedurally and substantively unfair. It further went on to find, that the Respondent's service was automatically unfair. The court then ordered Appellant to reinstate the Respondent to the position that was abolished four (4) years ago because she was rendering a good service to the Appellant. The reinstatement order of the court *a quo* effectively ordered compensation of thirty (30) months.

[10] Appellant has taken issue with the court *a quo's* judgment on the following arguments. On the first issue for decision concerning restructuring a prerogative of the employer it is contended for the Appellant that an employer is entitled to run his business and to structure his operations in the best way that he deems necessary. Whether such a decision is sensible or not is not for the court to interfere. All that the employer needs to do is follow the legal channels in effecting such restructuring. This call for the consultation of the employee who would be adversely affected by the restructure on *inter alia,* the means to avert or minimize the adverse effects of the possible retrenchment. The court is not required to interfere with the decision of the employer to restructure his business and to substitute its own. In this regard the court was referred to the legal authorities in the cases of *Van Rensburg vs Austein Safe Co. (1998) 19ILS 158, Kotze V Rebel Discount Liquor Group (Pty) Ltd (2000) 21 ILJ (LAG)* at *133* and the legal

textbook *John Grogan, Workplace, 7 Edition* at page *199.*

[11] Appellant further argues that in exercise of its rights as an employer, the Appellant *in casu* took a decision to restructure its establishment because in its view, the Respondent's position was not necessary nor essential in its operations. It was of the view that the Respondent's position was no longer serving its purpose and then no longer necessary since the duties in her department could be efficiently and effectively carried out by other departments within the establishment. It is the Appellant's contention that it was such circumstances a misdirection for the court *a quo* to find that by this decision the retrenchment of the Respondent's services was a sham and for it to interfere with the decision of the employer on how he decides to run his business as it was now considering the efficacy of the employer's decision and was thereby second guessing the employer's decision.

[12] The decision to retrench does not have to be for financial (commercial) rationale. The court

erred therefore in its finding that the decision was wrong since it was not based on any commercial rationale and this erring led it to conclude that the retrenchment of the Respondent was substantively unfair. It is submitted for the Appellate that once the employer makes a legitimate decision pertain the structure on how it wants to run the business. The court is not thereafter entitled to interfere to analyze or criticize whether the decision was commercially or financially wise. By interfering with the decision therefore, the court *a quo* erred in law hence it arrived at the conclusion that the termination was substantially unfair, when it should not have and ought not have. Contrary to what the court found or suggested, an employee does not have a right to permanent or indefinite employment with a particular employer. If the employer has taken a decision to restructure the business and such restructuring **results in the termination of the employment** of that particular employee, the termination cannot be regarded as unfair on the basis that the court believes the matter could have been handled differently. Whether a retrenchment is a sham will be determined by whether or not the employer has immediately replaced the employer.

[13] It is contended by the Respondent on the other hand that the redundancy and subsequent termination of services of the Respondent did not meet any of the guidelines set out in the Industrial Court case in the matter of *Write Solutions Consortium vs Mkhosi Madolo and Babazile Dlamini, Industrial Court Case No. 72/2001* where Parker J set out the following guidelines for termination on the grounds of redundancy:

(a) **The employer must consider ways and means to avoid and/or minimize the redundancy. This means that the employer must as a first step set out the considerations that it took in trying to avoid or minimize the redundancy. In the matter at *casu* the Appellant gave no such evidence in the court *a quo,* in fact, the Managing Director conceded under cross examination that this had not been done and it is apparent from the evidence that the Appellant refused the Respondent an opportunity to consult on this aspect.**

(b) **The employer must give sufficient prior warnings to a recognized or representative trade union of the pending retrenchment. There is a statutory requirement that each place of employment must have a workplace forum either in the form of a works council, or union/staff association.**

(c) **The employer must consult with such trade union prior to the retrenchment. In this case there was no such consultation.**

(d) **If no criteria are agreed upon, the employer must apply a fair and objective selection criteria. In the court *a quo* no selection criteria was established by the employer.**

(e) **The employer must give sufficient prior warning to the employee selected for retrenchment. In the court *a quo* notice was given to the Applicant as the letter of the 31 October was merely informing her of the termination of her services.**

(f) **The employer must consult with the affected employee and consider any representations made. No meaningful consultation was held as the Appellant refused to engage the Respondent on consultation**

[14] In this regard the court was further referred to the Industrial Court of Appeal Decision of *Zodvwa Kingsley and 10 others vs Swaziland Industrial Development Company Limited - Case No. 11/2003.* In this case the Industrial Court of Appeal found that the termination of the employees services as a consequence of them being redundant, due to a restructuring exercise, required exhaustive consultations (termed, *audi alteram partem).* In view of the fact that this had not taken place, the court held that the termination of their services was unfair. The court stated that:

> **"Consultation provides an opportunity *inter alia,* to explain the reasons for the proposed retrenchment, to hear representations on possible ways and means of avoiding retrenchments (or softening its effect) and to discuss and consider alternative majors. It does not require an employer to bargain with its workers or their union with regards to retrenchment".**

[15] This appeal concerns the validity of the termination of services of the Respondent by the Appellant on the grounds of redundancy.

[16] In this respect, the Appellant is required to demonstrate that there existed at the time of termination of services, valid *(bona fide)* and fair reasons at the time of termination of employment of the Respondent on the grounds of redundancy.

[17] The termination of services on the ground of redundancy, as stated by above, is what is

considered a no fault termination. The Appellant is also required to demonstrate to the court, that it adopted a fair and correct procedure in affecting the termination of the Respondent's services on the ground of redundancy. The appellant must also demonstrate that, having taken into account all the circumstances of the matter, it was reasonable to terminate the services of the Respondent.

[18] The second aspect of the appeal is that even if the Appeal Court were to find that the termination of the Respondent's services was unfair and therefore constituting an unfair termination of service, the Appellant contends that the reinstatement was not appropriate in the circumstances.

[19] Accordingly therefore there are three enquiries to be determined in respect of this appeal:

> (a) Was the termination of the Respondent's services on the grounds of redundancy procedurally and substantively fair?
> (b) Was the termination of the Respondent's services on the grounds of redundancy, reasonable in the circumstances of the matter?
> (c) Was the remedy of reinstatement which was imposed by the court *a quo* appropriate in the circumstances?

[20] Having considered the arguments of the parties, it would appear to me that in dealing with the question as to whether or not there were substantive and procedural grounds for the termination of the Respondent's services by the Appellant, the court *a quo* came to the correct conclusion that there were no valid grounds for the termination of the Respondent's services and that the Appellant failed to follow the required procedural steps in effecting the termination of the Respondent's services on the ground of redundancy was unreasonable in the circumstances.

[21] The court *a quo* came to the conclusion that the termination of the Respondent's services was both substantively and procedurally unfair for the consideration set out in paragraph 26 to 36 of the judgment of the court *a quo.* In this regard I find the reasoning in the South African case of *S.A. Mutual Life Assurance Society vs Insurance and Banking Staff Association and Others (2001)*

9 R.L.L.R. 1045 apposite where it was held that there must be an objective link between the dismissal and the needs of the employer to restructure. The employer's mere *ipse dixit* that a dismissal was affected for certain restructuring reasons, will not be enough. There needs to exist a valid *(bona fide)* and fair reason for the termination on the grounds of redundancy.

[22] The court *a quo* came to the correct conclusion that the employer had failed to discharge the onus placed upon it by the law. This finding by the court *a quo* was a finding on the facts that were presented before the court as evidence. The evidence was:

> **(i) The employer failed to give any reasons or factors giving rise to the restructuring. The evidence of the Managing Director was that it was the Board that decided to restructure the operations of the organization, with no input whatsoever from the management.**
>
> **(ii) The Managing Director stated that the position of the personnel officer was important and prior to the restructuring, had played a cogent role in the organization.**
>
> **(iii) That there were no financial constraints or other compelling factors such as consultancy studies that had been carried out prior to the restructuring process.**
>
> **(iv) That his job was to implement the Board decision and as such, he could not deal with the underlying factors and background to the restructuring.**

[23] In view of the above-cited findings by the court *a quo* in relation to the absence of substantive reasons for the restructuring and subsequent termination of services, I am in agreement with the Respondent's argument that these constitute findings of fact, for which no appeal may lie.

[24] The first ground of appeal pertains to the right of an employer to structure its operations in the manner in which it wants. The court *a quo* correctly found that the functions of the court was to ensure that the right to restructure was not abused by employer, but that it would be exercised in circumstances wherein it was apparent that all procedurally and substantive safeguards to ensure that the decision is *bona fide* and implemented in a fair and objective manner are in place. The Appellant failed to satisfy this requirement.

[25] The second ground of appeal is that, the Respondent frustrated meaningful consultations with

the Appellant by refusing to take part in it notwithstanding various persuasion until very late in the day. It would appear to me that this is clearly a challenge to a finding of fact and for which no appeal lies. In this regard I refer to the case of *Zodvwa Kingsley vs SIDC (supra)* on the obligation to consult the affected employee, prior to the termination of the employee's services. The consultation process includes, as part of the process, a communication by the employer of options that have been considered as ways and means of avoiding the retrenchment.

[26] The next ground of appeal pertains to the finding by the court that there was an automatic termination, in as much as, such was not reported to the CMAC and as such the court was not obliged to take it into cognizance without it having been reported and conciliated upon.

[27] The concept of **automatically unfair dismissal** was introduced for the first time in the Industrial Relation Act of 2000. Section 2 of the Industrial Relations Act outlines the instances which constitute or bring into operation the concept of automatically unfair dismissal constitute a competent remedy that may be awarded by the court based on the evidence before it. If upon hearing testimony, the court is of the view that the conduct of the employer constitutes an automatically unfair dismissal, then it may categorize the dismissal as being automatically unfair.

[28] In arguments before us Counsel for the Appellant conceded the point made by the Respondent as stated above. It must also be emphasized that the court does not need to make a finding of automatically unfair dismissal in order to grant reinstatement. Section 16 (1) of the Industrial Relations Act provides that **if the court finds that a dismissal is unfair, the court may (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal or** It appears on the facts of the present case that the court *a quo* correctly came to the conclusion that the appropriate remedy in the present matter was one of reinstatement.

[29] In making this finding, the court *a quo* conducted a factual enquiry and came to the conclusion on the facts before it that the remedy was appropriate. Therefore no appeal lies against this factual finding made by the court *a quo.*

[30] We also have come to the considered view that the court *a quo* was entitled when ordering reinstatement to also order payment of wages from date of dismissal to the date of judgment. However the court *a quo* felt that this will be too onerous on the Appellant and ordered that it be retrospective for a period of 30 months reckoned from 1st December 2003 to the 1 May 2006. In this respect we find that the court *a quo* was correct and no appeal lies against such finding.

[31] In respect of paragraph 8 of the Notice of Appeal we come to the view that this constitutes grounds for review. An attack on a decision of the court, to the effect that it took into account extraneous considerations not supported by the evidence is not a permissible ground of appeal.

[32] On the issue of the pension monies, the Respondent concedes that the judgment of the court *a quo* in so far as paragraph C of the order is concerned, was incorrect. The appropriate order is that the Respondent should repay the amounts paid to her as a pension at the time of termination of service, and the Appellant is ordered to comply with paragraph C of the judgment. Therefore the judgment of the court *a quo* is altered to this extent.

[33] In the result, for the afore-going reasons the appeal is dismissed with costs.

S.B. MAPHALALA-JA

I agree

R.A. BANDA – JP

I agree

M.D. MAMBA-JA