IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.22/2005

In the matter between:

EMMANUEL MKHWANAZI **Applicant**

And

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

CORAM:

SIFISO NSIBANDE : ACTING JUDGE

PHUMELELE THWALA: MEMBER

ANDREAS NKAMBULE: MEMBER

MR S. DLAMINI: FOR APPLICANT

MR L. ZWANE: FOR RESPONDENT

JUDGEMENT
26th June, 2008

1] The Applicant Emmanuel Mkhwanazi was employed by the Respondent KK Investments (Pty) Ltd on 1st August 1994 as a Shop Manager.

2] There is some dispute as to when his services were terminated but it is common cause that he was earning El 500 at that time.

3] The Applicant reported a dispute in terms of the Industrial Relations Act 2000 claiming that his services were unfairly terminated. The Conciliation Mediation and Arbitration Commission issued a certificate of unresolved dispute.

4] The Applicant duly instituted an application in the Industrial Court claiming maximum compensation for unfair dismissal in the sum of El8 000 (Eighteen thousand Emalangeni).

5] The Applicant's claim is that his services were terminated under the pretext of redundancy. He states in his statement of claim that the Respondent:-

(a) failed to serve him with notice of the redundancy
(b) failed to consult with him prior to his retrenchment; and
(c) failed to comply with the provisions of section 40 of the Employment Act 1980 (as amended).

6] The Respondent in its Reply responded that the Applicant's services were fairly terminated on grounds of redundancy and that the provisions of Section 40 (2) of the Employment Act 1980 (as amended) were complied with.

7] The Respondent stated further that the Applicant was not served with the notice of redundancy due to his own fault, in that he avoided a meeting scheduled for that purpose and was not heard from until September 2003 when he brought an urgent application against the Respondent.

8] It is common cause that the Applicant was paid all his terminal benefits and that the only issue remaining is whether the Respondent had a fair reason for terminating Applicant's services and whether that termination was reasonable in all the circumstances (as per section 42 (2) of the Employment Act).

9] The Applicant testified as to the circumstances of his termination and in its defence the Respondent called one witness namely its Human Resources Manager Mr. Elmon Dlamini.

10] The Applicant testified that on 28th May 2003, he together with eleven (11) of his subordinates were called to a meeting by one of the Respondent's directors (Mrs Ndlovu) who was with the Human Resources Manager, Mr. Elmon Dlamini. At that meeting the employees, including applicant, were verbally advised that there would be a lay off of all employees for two months because they were to be relocated to a shop to be established in Manzini. The lay-off was confirmed by letter dated 9th June 2003. The letter was annexure "EMA" to the Applicant's statement of claim.

11] Applicant testified that the lay-off indeed happened and that all employees returned to work on 12th August, 2003. On the employees' return from the lay off, a meeting was called for them but before it commenced the Applicant was asked to leave same. He was advised that he would meet the directors on the 19th August 2003.

12] It was the Applicant's evidence that on the 19th August, 2003 he met the Human Resources Manager Mr. Dlamini, who advised him that management was not available to meet him. Mr. Dlamini asked the Applicant to telephone him on the 26th August, 2003 to ascertain the new date of his meeting with management. Mr. Dlamini even suggested to Applicant that he should telephone from the eBuhleni branch of the Respondent so that he could phone for free.

13] The Applicant testified that on 26th August, 2003 he telephoned Mr. Dlamini but no date was forthcoming. On the 4th September, 2003, Applicant approached Mr. Dlamini at Piggs Peak to ascertain when he would meet the management of Respondent. He was told that management had asked Mr. Dlamini (The Human Resources Manager) to leave the Applicant's matter to the directors and not to deal with him any further. Mr. Dlamini advised the Applicant he therefore had no information regarding the planned meeting between Applicant and management of the Respondent. Mr. Dlamini, the Respondent's Human Resources Manager

confirmed in/during his examination in chief that he had been told by the Respondent's directors not attend to the planned meeting with Applicant.

Applicant further testified that up until this time (August 2003) his position had not been clarified and he still considered himself an employee of the Respondent. Consequently, he sought and obtained an order from this court against the Respondent in September 2003, for

payment of arrear wages being June, July, August and September 2003 wages.

When he sought a similar order in February 2004, the Respondent opposed his application and the court entered a consent order in terms of which he accepted a retrenchment package without prejudice to any other rights he may have had emanating from his employment.

He thereafter reported a dispute with the Conciliation, Mediation and Arbitration Commission as aforesaid.

In cross-examination, it was put to the Applicant that he was a part of a meeting of 7th June 2003 where all employees were told of the decline in business of the Respondent and consulted on the pending redundancies. His response was that he knew of no such meeting.

It was also put to him that he failed to attend a meeting on the 19th August 2003 the purpose of which was to consult with him and a certain Mr. Ndlovu regarding the pending redundancies. His response was that he in-fact attended to the meeting venue on 19th August, 2003 but was told by the Human Resources Manager that there would be no meeting as the directors were not available to meet with him. He insisted that it was the Respondent's directors who failed to attend the meeting with him. He insisted he was never consulted on the redundancy.

The Respondent's Human Resources Manager stated that it was not possible to consult with the Applicant nor to give him notice of the redundancy because he failed to attend the initial consultative meeting arranged for him. The Respondent thereafter was unable to contact the Applicant as he had no telephone and Respondent did not have his address nor did he know where to find him both at Piggs Peak or Mayiwane (Applicant's rural home). Further, the Human Resources Manager was himself later barred by the Respondent from involvement in the Applicant's issue.

Mr. Dlamini further gave evidence that since 2001 the Respondent had suffered a severe downturn in business turnover. The reason for this he said was the establishment of the Central Business District in Piggs Peak which meant that less people reached the Respondent's shop as competition intensified.

The Respondent produced in evidence copies of financial statements for the year ended 30th June 2002. These statements reflect a substantial downturn in turnover and consequent losses. Mr. Dlamini stated that in an attempt to avoid the redundencies the respondent considered relocating the shop to Manzini where it was believed business would be better. This was after the employees had refused other cost cutting measures such as having them work half days for

half their pay. Finances for relocating the shop to Manzini were not available and thus the shop did not relocate but eventually closed.

Mr. Elmon Dlamini also testified that the Respondent had complied fully with its obligations under Section 40 of the Employment Act 1980, to the satisfaction of the Commissioner of Labour. In this regard Mr. Dlamini testified that he had a verbal discussion with an officer at the Labour Commissions offices wherein the employees' retrenchment package was calculated at E84 000 or so and an agreement reached wherein a sum of E14 022 would be deposited at the Labour Department Piggs Peak by the Respondent each month to be collected by the employees as part payment of their terminal benefits until the sum of E84 000-00 was fully paid. The Applicant's terminal benefits were according to Mr. Dlamini, also deposited at the Labour Department for collection by the Applicant.

Mr. Dlamini did not have any document regarding the redundancies but indicated that he had later written to the department advising it of the people to be affected, their positions and what terminal benefits were due to them. He handed in a letter from the department dated 3rd October 2003 which referred to the Respondent's letter of 22nd August 2003.

The Respondent has the burden of proving that the reason for the termination of the Applicant's employment is one permitted by Section 36 of the Employment Act. The Respondent has relied upon section 36 (j) of the said Act, which provides that it shall be fair to terminate the services of an employee where the employee is redundant. The Respondent's case is that Applicant was a redundant employee in terms of Section 2 of the Employment Act, and that his services were terminated as a result of the financial difficulties experienced by the Respondent due to the decrease in the volume of the Respondent's business.

The Respondent's version of a downturn in business was not challenged by the Applicant. No aspect thereof was put in issue save that the Applicant stated that business was going well in the years 2002 and 2003. The financial statements and Mr. Elmon Dlamini's evidence establish on a balance of probability that the Respondent experienced a downturn in its turnover and consequent financial losses and difficulties due to the increase in competition after the establishment of the Piggs Peak Central Business District. The court finds therefore that there was a commercial rationale which prompted the Respondent to close down the shop and that the decision to retrench was reasonable.

The question that follows is whether the retrenchment exercise was carried out in terms of the dictates of the law. From the evidence before the court eleven employees were affected by the

closing down of the shop. It is clear therefore that the applicable law was Section 40 of the Employment Act No.5 of 1980 (as amended). Section 40 (2) thereof reads as follows;

> ***"Where an employer contemplates terminating the contracts of employment offive or more of his employees for reasons of redundancy, he shall give not less than on month's notice thereof in writing to the Labour Commissioner and to the organization (if any) with which he is a party to a collective agreement and such notice shall include the following information;***
>
> (d) ***the number of employees likely to become redundant;***
> (e) ***the occupations and remuneration of the employees affected;***
> (f) ***the reasons for the redundancies;***
> (g) ***the date when the redundancies are likely to take effect;***
> (h) ***the latest financial statements and audited accounts of the undertaking, and***
> (i) ***what other (options) have been looked into to avert or minimize the redundancy."***

The evidence before court is that the Respondent wrote to the Labour Commissioner notifying him of the retrenchment exercise. However it is common cause that such notice was not given to the Applicant. Respondent's witness Mr. Dlamini stated in his evidence in-chief that on the date set for a meeting with the Applicant and another employee Mr. Ndlovu, no letter notifying the Applicant of the redundancy had been prepared, nor was Mr. Ndlovu given any letter notifying him of the redundancy exercise.

It is also common cause that no consultation took place with the Applicant. Applicant says this was because Respondent's directors failed to attend the meeting set for same while the Respondent alleges it was Applicant who failed to attend. The Respondent made no further effort to call in the Applicant because it did not know where or how to find him.

29] The court is unable to accept the Respondent's version of events. It is unbelievable that the Respondent did not know where or how to contact its manager and could it not use the media if it really was interested in meeting with him. Further after applicant launched the application for arrear wages in September 2003 an opportunity arose for Respondent to at least inform him of the redundancy. This did not happen until February 2004 when the Applicant launched a similar application.

30] Mr. Dlamini for the Respondent further confirmed the Applicant's evidence that after the meeting of 19th August 2003 the Applicant called from the Respondents eBuhleni Branch. He infact stated that it was he (Dlamini) who advised Applicant to call from the said branch. This is consistent with the Applicant's evidence that he telephoned on 26th August, 2003 following the failure of the meeting of 19th August 2003 to take off.

31] The court finds therefore that the Applicant was not given notice of his retrenchment and that the section 40 statutory notice was not given. Further Applicant was not given an opportunity to make any representation regarding his redundancy.

32] In **Boniface Dlamini v Swaziland United Bakeries Industrial Court Case No.200 of 2002,** the Judge President stated that while it was not necessary that each and every employee earmarked for redundancy be individually consulted before his retrenchment, *"employees selected for redundancy must be afforded an opportunity to make special representations regarding their individual circumstances, should they wish.*

> ***See also National Union of Metal Workers of South Africa*** *vs.* ***Atlantis Diesel Engines (1993) 14ILJ 642 (LAC).***

33] In this case, Mr. Dlamini for the Respondent confirmed that the Respondent operated another branch of the business at eBuhleni. Whether there were positions available at that branch is not known to the court. However, the applicant was clearly prejudiced by the failure to consult in that the possibility of placing him at the branch would not even be contemplated for lack of consultation.

34] In the **Boniface Dlamini v Swaziland United Bakeries (Pty) Ltd Case No.200/2002** the Court President quoted the case of **Govender and Others Vs Nugshoe (1993)2 LCD 59 (IC)** with approval. In that case the SA Industrial Court found a retrenchment unfair because the individual employees had received no advance notice of retrenchment and were given no opportunity to consider the selection criteria applied to them or to make representations in regard thereto.

35] From the evidence presented in court, it is clear that no notice of redundancy was given to the Applicant as should have been in terms of Section 40 of the Employment Act 1980 (as amended). Nderi Nduma Judge President in **Amos Dlamini v Swaziland Breweries 262/2002** stated that *"there can be no substantive compliance with the requirements of the Act if this provision is not fully complied with."* The failure of the Respondent to issue the notice envisaged by section 40 means that Respondent has not complied with the requirements of the

Act.

36] The court is of the view that the Respondent had a duty to notify the applicant in advance that it was contemplating retrenchment and that his employment would be affected. Written notification ought to have been given to the Applicant. Furthermore, there was a duty to consult with the Applicant individually - in-fact the Respondent appears to have abandoned its intention to consult with the Respondent and no reason was advanced in court for that.

37] The court will therefore come to the conclusion that the Applicant's termination was procedurally unfair for lack of notification as set out in section 40 (2) of the Employment Act (as amended) and for lack of consultation.

38] In terms of section 16 (4) of the **Industrial Relations Act No.l of 2000 (as amended),** if a termination is unfair only because the employer did not follow a fair procedure, compensation payable may be varied, as the court deems just and equitable.

39] The Applicant conceded that the shop was eventually closed down and that his retrenchment package was paid. The only available remedy is compensation.

40] In making a fair and reasonable award the court will take into account that the Applicant has failed to get employment since his services were terminated by the Respondent and that he is married with eight children.

41] Taking into account all these factors the court will make an order that the Respondent pays the Applicant as compensation an amount equivalent to seven months salary calculated at the Applicant's rate on the date of termination being:

E1500x7 = E10 500

No order is made as to costs.

S. NSIBANDE
ACTING JUDGE