

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 151/2009

In the matter between:

MASTER GARMENTS

APPLICANT

and

**SWAZILAND MANUFACTURING AND
ALLIED WORKERS' UNION**

RESPONDENT

CORAM:

**S. NSIBANDE JOSIAH YENDE
NICHOLAS MANANA**

**PRESIDENT
MEMBER
MEMBER**

**MR. M.H. MDLULI
MR. A. FAKUDZE**

**FOR APPLICANT FOR
RESPONDENT**

**JUDGEMENT 16th
APRIL 2009**

1. The Applicant has applied to court on a certificate of urgency claiming for an order: -

"1. Dispensing with the time limits, normal forms and manner of service required by the rules of this Honourable Court and hear this matter as one of urgency;

12.1 *An order declaring that Applicant's two weeks' Notice of Redundancy to its employees is in terms of **Section 33(2) of the Employment Act;***

12.2 *An order declaring that the Applicant can use a notice in lieu of Additional Notice and be served on the job other than by way of payment;*

4. *Granting Applicant costs of this application;*

5 *Granting any further and / or alternative relief."*

The Applicant carries on business in Matsapha in the textile Industry and has come to the decision to cease operations and retrench its entire workforce as a result of what it calls "**some unfavourable financial position.**" Notices of redundancy were issued to the Respondent, the Commissioner of Labour and the employees, advising that the Applicant would embark on a retrenchment exercise in April 2009.

The Respondent and the Commissioner of Labour were advised that the notice was effective 26th February 2009 and would lapse on 26th March 2009 and that the last day of work was set as being the 3rd April 2009. The notice to employees advised that they would be serving notice from 26th February 2009 until 3rd April 2009 when work would finally stop.

The Applicant states that all issues regarding the retrenchments have been finalised (including the payment of the employees' terminal benefits) save for the issue of notice pay due to the employees. The Applicant states in its papers and in argument that two issues are in dispute regarding notice and are the following:

12.3 Duration of the notice period - Applicant submits that the employees are lawfully entitled to two weeks notice in terms of section 33 (2) of the Employment Act since they are paid on a fortnightly basis.

12.4 Entitlement to payment in lieu of additional notice - Applicant submits that it has given all employees 16 days additional notice which has been served and that there is no obligation to pay those employees whose additional notice is below 16 days. Further, that those employees who are owed in excess of 16 days for additional notice ought to be paid for their additional notice days less the 16 days served.

12.5 The Respondent, a trade union recognised by the Applicant, opposes the

application and states that the parties had agreed that the notices of redundancy were defective and that the employees would be paid in lieu of notice. The only issue, according to the Respondent was the period or amount of notice to be paid. The Respondent submitted that payment in lieu of notice ought to be made to the employees in terms of section 33(1) of the Employment Act, in view of the defective nature of the notices issued by the Applicant.

12.6 The Applicant relies on section 33(2) of the Employment Act 1980 which reads:

"Notwithstanding any other provision of this section, where an employer has completed his probationary period of employment and is employed on

a contract of employment which provides for him to be paid his wages at monthly or fortnightly intervals, the minimum period of notice of termination of employment to be given to that employee shall not be less than one month or a fortnight as the case may be."

Section 33(1) (c) of the same Act reads:

"Subject to section 32, the minimum notice of termination of employment an employer may give an employee who has completed his probationary period of employment, and who has been continuously employed by that employer for more than one month shall be -

(c) if the period of continuous employment is more than twelve months, one month and an additional four days for each completed year of continuous employment after the first year of such employment."

Section 33(1) (c) of the Act entitles employees who have been in continuous employment with the same employer for over twelve months to be given one month's notice of termination of employment plus four days for each completed year after the first year. Section 33(2) appears to take this entitlement away by saying that the minimum period of termination of employment is dependant on whether the employee is paid monthly or fortnightly.

It is the Court's view that section 33(2) of the Act does not in fact take away the entitlement to the notice periods set out in section 33(1) (c). In the Court's view section 33(2) applies to employees who have not been in continuous employment with the

same employer for over twelve months. It seeks to improve the position of employees who have completed their period of probation but have had a period of continuous employment of less than twelve months. In terms of section 33(1) (a) where an employee has worked continuously for less than three months such employee would be entitled to one week's notice. However, section 33(2) alters this position by setting the minimum period of notice to be one month or a fortnightly depending on the payment period of such employee. It is inconceivable that it was the legislature's intention to increase the period of notice as it did in section 33(1) and then decrease it again in section 33(2).

10. Section 33(5) of the Employment Act regulates the issue of payment where notice has not been given. The section reads:

"Nothing on this section shall prevent either party terminating a contract of employment by paying the other party, in lieu of notice, an amount equal to the basic wages which would have been earned by the employee during the notice period."

12.7 It follows from a reading of this section that where the notice due to employees is properly given and served by the employees it is not necessary to pay such employees anything other than the wages earned during the notice period. There is no obligation to pay anything extra where notice is properly given and served by the employee.

12.8 In the result, the Court makes the following order:

12.9 The Applicant is directed to pay notice pay due to its employees in terms of Section 33(1) of the Employment Act.

12.10 The respondent granted leave to file a counter application regarding the question whether the notices of redundancy issued by the Applicant are lawful within fourteen days of this order.

13. There is no order as to costs.

The members agree.

S. NSIBANDE
PRESIDENT OF THE INDUSTRIAL COURT