# IN THE INDUSTRIAL COURT OF SWAZILAND

**HELD AT MBABANE** **CASE NO. 255/06**

In the matter between:

**NKOSINATHIHLATSHWAKO** **APPLICANT**

and

**SWAZILAND INTERNATIONAL IRRIGATION**
**(PTY) LTD** **RESPONDENT**

**CORAM:**

**S. NSIBANDE JOSIAH YENDE** **PRESIDENT**
**NICHOLAS MANANA** **MEMBER**
**MEMBER**

**MR. M. MKHWANAZI** **FOR APPLICANT**
**MR. M. SIBANDZE** **FOR RESPONDENT**

**JUDGEMENT- 5 AUGUST 2009**

1. The Applicant was employed by the Respondent as financial controller at the Respondent's undertaking situate at the Matsapha Industrial sites. Applicant started work in April 2004 and on completing a 6 month probation period entered into a 12 month written contract of
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2004. The contract was to terminate on 31st September 2005.

22. On the 31 January 2005, some eight months before the agreed date of termination the Applicant's employment was terminated by letter dated 26th January 2005. The letter of termination was handed into court as an exhibit.

23. In the letter of termination the Applicant was notified that his contract of employment was being terminated with effect from 31st January 2005 for the reason that given its size, the company could not justify the existence of his

position. The company felt it was not big enough to sustain the position. Effectively his position at the company was being made redundant with immediate effect. The company gave him sixty days notice of termination which he was not required to serve. He was advised that such notice was in terms of clause 5 of the contract of employment.

24. Clause 5.1 of the contract of employment reads: *"Either party may give two month's notice (this being 60 days) to the other in writing stating the intention to terminate this agreement."*

25. The Applicant reported a dispute to the Labour Commissioner who in turn referred the dispute to the Conciliation Mediation and Arbitration Commission. The dispute was unresolved and the Commission issue a certificate of unresolved dispute.

26. The Applicant duly instituted the application before court claiming payment for the unexpired period of his contract of employment (8 months) and maximum compensation for unfair dismissal (24 months).

7. In his particulars of claim the Applicant states that his dismissal was wrongful, unlawful and unfair (both substantively and procedurally) for the following reasons:

27. The Applicant diligently carried out his duties.

28. Owing to his position in the company, he was privy to the company's financial situation and cash flow position and generally knew what the company could afford to do and otherwise.

29. The Respondent did not hold a disciplinary hearing for the Applicant and/or did not follow the procedures for retrenchment on grounds of redundancy and/or offer an alternative post for the Applicant, which are all provided for by the law.

30. The reasons for the dismissal are not justified by Section 42 of the **Employment Act 1980** (as amended).

31. The Respondent in its reply responded that the dismissal of the Applicant was lawful and in terms of Section 36 (j) of the **Employment Act** and also in

terms of section 5.1 of the contract of employment and was therefore substantively and procedurally fair. The Respondent further stated that the company's financial position forced it to declare the Applicant's position redundant.

32. The Respondent in its final submission stated that since the **Employment Act 1980** contemplates the existence of fixed term contracts there is therefore no reason why a fixed term contract cannot be terminated by agreement. It was submitted that the Applicant's contract of employment was terminated by agreement as per clause 5.1 of the contract.

33. The Applicant's contract of employment was not terminated by agreement. It was terminated unilaterally by the Respondent, on notice in terms of clause 5.1 which permitted such termination on 60 days notice. The question is whether such termination is fair and reasonable in the circumstances of this case.

34. Section 35 (1) (d) of the Employment Act provides that: this section shall not apply to an employee engaged for a fixed term and **whose term of engagement has expired** (my emphasis).

It is common cause that Applicant's term of engagement had not expired when his services were terminated. The Applicant's situation was therefore not the one envisaged by Section 35 (1) (d) which would have excluded the Applicant from the protection provided by the section. It is our view that the Applicant was therefore an employee to whom Section 35 of the **Employment Act 1980** applies. The termination of his contract of employment before the agreed termination date must therefore be fore a reason permitted by Section 36 of the Employment Act. The Respondent accordingly bears the onus of proving on a balance of probabilities that it has a fair reason for terminating the services of the Applicant, and that the termination was reasonable in all the circumstances as per section 42 (2) of the Employment Act.

12. The Applicant testified as to the circumstances of his retrenchment.
The Respondent called one witness in its defence, namely its
Managing Director Mr. Ron Margalit.

35. The Respondent's witness Mr. Margalit testified that after a financially successful 2004, there was a down turn in business in 2005. He had

expected a water treatment project to start during 2005 but later realised that the project wouldn't start timeously. That is when a decision to cut as much expenses as possible was taken. He stated that the Respondent is a project driven company and that without projects the company would suffer. It was at that stage that the directors met and decided that the Applicant's position was no longer required and to reduce as much expenses as they could.

36. The Applicant testified that on 20th January 2005, he received a letter from the Respondent awarding him a cost of living adjustment in his gross salary of 10% effective January 2005. The letter states that the decision to award the 10% increment was taken by the Respondent after a review of the circumstances in Swaziland and that although it was not guaranteed, it would continue in the foreseeable future.

37. The Applicant was taken by surprise some 10 days later to receive a letter from the Respondent advising him of the termination of his employment. The letter terminating Applicant's employment came 10 days after the Respondent had seen it fit to award Applicant the increment and was written on 26th January 2005 a mere 6 days after the increment was awarded. It does not explain what has happened in those six days that caused such a drastic change in the employment relationship.

38. Mr. Margalit's explanation of this apparent contradiction was to say that the increment had been directed to the Applicant only and not to the other employees. But that does not explain what had changed so drastically within the 6 days. When it was put to him in cross exarnTnlrtion^^ incentives promised therein were inconsistent with a company doing badly, Mr. Margalit stated that his evidence was that the Respondent's future did not look good not that it was not performing well.

39. The Respondent did not produce in evidence any financial statements for the 2004 and 2005 financial years to show the down turn in business. It did not produce financial statements for 2006 financial year to show that its fears for the future of the company justified that it terminate the Applicant's contract eight months before its termination date. The contract has no renewal clause instead it stated categorically that at the end of the period it would automatically be terminated. The Respondent would not have been expected to keep the Applicant beyond September 2005 nor could the Applicant have legitimately expected so in the absence of a renewal clause.

40. It was the Respondent's evidence that although it did retrench other employees, it did so in May of 2006. The Applicant was the only employee retrenched in 2005.

41. In our view, the Respondent has failed to establish on a balance of probabilities that it had a fair reason permitted by Section 36 of the **Employment Act** to terminate the Applicant's services.

42. As aforementioned the Respondent concedes that it did not consult with the Applicant regarding the redundancy. No prior notification was given to the Applicant regarding the redundancy contrary to the dictates of fairness, equity and good industrial relations. It is common cause that the Applicant was given no opportunity to make representation regarding his position. The Respondent's position was

__that^he ought to have known the state of its finances due to the nature of his position. In our view acknowledgement of the down turn in Respondent's business does not equate to knowledge of looming redundancy. To this extent the court finds that the retrenchment exercise was procedurally unfair,

See also **Boniface Dlamini v Swaziland United Bakeries (Pty) Ltd I.C. Case No. 200/02.**

21. For the above reasons, the termination of the Applicant's services was substantively and procedurally unfair. We consider that the Respondent paid Applicant 2 months salary as notice and that he found new employment in June 2005. We also take into account the callous manner in which the termination of Applicant's contract came about a mere 8 months before the agreed date of termination.

Section 16 of the **Industrial Relations Act** empowers the court to order reinstatement, re-engagement or compensation in the event that it finds that a dismissal was unfair. Applicant is now employed elsewhere and re-instatement or re-engagement would not be suitable to him nor did he seek same. The court will award compensation for unfair dismissal in the c circumstances. We believe it is just and equitable to award compensation equivalent to six (6) months remuneration.

43. Judgement is entered against the Respondent for payment of: Compensation for unfair dismissal **E 99000.00**

44. There is no order as to costs in view of applicant's inflated and unsubstantiated claim of 24 months compensation plus the balance of his contract which cannot be justified in terms of Section 16 of the Industrial Relations Act.

**S. NSIBANOE**

**PRESIDENT OF THE INDUSTRIAL COURT**