

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 121/06

In the matter between:

SARAH SINDI MAGAYA

APPLICANT

and

**ISABELLE KEENE t/a ADDITIONAL
CLOTHING**

RESPONDENT

CORAM:

NKOSINATHI NKONYANE DAN

JUDGE

MANGO GILBERT NDZINISA

MEMBER

**FOR APPLICANT FOR
RESPONDENT**

MEMBER

**N.D. JELE M.
SIBANDZE**

JUDGEMENT 14.08.09

[1] The applicant was first employed by the respondent in August 1999 as a maid. During 2001 the applicant was transferred to work at the respondent's shop situated in town at the Swazi Plaza in Mbabane.

[2] The respondents shop sells ladies clothes. It is a small shop, about twenty five square metres in size. The respondent also employs three ladies based at her residence who sew some of the clothes that are sold at the shop. There were two employees at the shop, being the applicant and Thembi Dlamini. The applicant's duties involved cleaning, paying the bills, banking and selling the goods to customers.

[3] The applicant fell sick. She was away from work for about two to three

months. After her recovery she came back to work. One day Labour Inspectors came to the shop and advised her that she should be paid on the scale of a cashier as she was also receiving money from customers. The respondent told the applicant that she could not afford to pay her on the scale of a cashier. The respondent told her that since she could not afford to pay the applicant on the scale of a cashier, the applicant's job was rendered redundant, and the applicant's service was accordingly terminated by the respondent.

[4] The applicant filed a complaint with the office of the Labour Commissioner in terms of Section 41 of the Employment Act No.5 of 1980 (as amended). The conciliation process was not successful hence the present application wherein the applicant is claiming reinstatement, underpayments for the year 2000 to date of dismissal, notice pay, underpayment for May 2004, additional notice, severance allowance, leave pay for fifteen accumulated days, sick leave for February 2004, maximum

_____kompensaiicui.aruiaay^_____i_____

[5] In her written submissions the applicant indicated that she was abandoning the claims for leave pay, sick leave and underpayments. The applicant's counsel also applied to amend the papers to reflect that the applicant was employed as a shop assistant and not a cashier. There is clearly no prejudice that the respondent would suffer if this amendment is granted by the court and it is accordingly granted.

[6] The respondent said she terminated the applicant's service on grounds of redundancy. She said the business was not making enough money to allow her to pay the two employees at the shop on the correct or lawful scale in terms of the Regulation of Wages (Retail, Hairdressing, Wholesale and Distributive Trades) Order, 2003.

[7] What was clear from the evidence before the court however was that

the respondent's conduct of terminating the applicant's service was a reaction to the applicant's act of requesting to be paid on the correct salary scale. The applicant got legal advice that she was not being paid on the correct salary scale from Labour Inspectors who came to conduct an inspection at the shop. She denied that it was her who invited the Labour Inspectors to come to the shop. She said the Labour Inspectors were just doing their routine job in all the shops at the Swazi Plaza. Even if the applicant did invite the Labour Inspectors, there was clearly nothing wrong with that. She had the right to seek legal advice with regards to a matter that pertains to her employment condition.

[8] The respondent failed to produce audited financial statements of the business to prove that it was financially going down. The respondent also failed to tell the court what other means did she look into to avert the alleged redundancy of the applicant's position. The respondent said she did sit down with the applicant to discuss the bad financial position of the company. The applicant denied this. She said the respondent told her on Friday to come back to work on the following Monday at 08:30 a.m. She said when she came the respondent did not discuss anything with her but simply gave her a document showing the amount of terminal benefits that the respondent was prepared to pay to her. This document is annexure "SSM3" of the book of pleadings. The respondent told the court that she also sought legal advice from the Labour Inspectors as to how to deal with the situation that she was facing.

[9] The court accepts the applicant's evidence that there was no meaningful discussion between the parties. The evidence clearly showed that the respondent was angry about the fact that she had been reported to the Labour Commissioner's Office that she was not paying the applicant according to the applicable Wages Order. The relationship between the parties had become

acrimonious,

[10] The respondent told the court that the business was doing so bad that she applied to the landlord for a decrease in rental. This evidence was however not supported by any documentary proof. She said she had many other expenses that she catered for. The respondent failed however to produce to court audited accounts of the business showing the income and expenditure statements. The respondent produced the book in which the daily takings were recorded. She said the business made about E15,000:00 to E20,000:00 per month and up to E30,000:00 per month during the Christmas season. The picture was clearly not as bad as the respondent tried to paint to the court. The respondent having failed to produce proof of the expenses of the business, it was difficult for the court to accept her evidence that the business was financially going down as to necessitate her to retrench one of her employees. After > the applicant was retrenched, the respondent hired another employee to replace the applicant by the name of Sylvia Msibi.

[11] The evidence led before the court clearly revealed that the applicant was doing the job of a shop assistant. In the Wages Order a shop assistant is described as ;

" a person wholly or mainly employed for purposes of transacting business with customers or displaying goods in a place where such goods are exhibited for sale to the public in a superirjarketor-simiiarest^Us^ years experience in such work."

[12] The respondent has therefore failed to prove before the court on a balance of probabilities that the applicant was dismissed for a reason permitted by Section 36 of the Employment Act. The respondent also failed to tell the court what criterion did she use to determine that among the two employees at the shop, it was the applicant who should be retrenched. To the contrary, the evidence showed that the applicant was dismissed for asserting her right to be

paid in terms of the correct salary scale after she got advice from the Labour Inspectors that taking into account the work that she was performing, she was supposed to be paid as a shop assistant. The dismissal of the applicant was therefore automatically and procedurally unfair.

[13] Taking into account all the foregoing observations the court will accordingly enter judgement against the respondent.

[14] **RELIEF:-**

The applicant is presently self employed as a hawker. She has not managed to find full time employment in the formal sector since her dismissal in May 2004. The evidence showed that the parties had a good working relationship prior to the dispute about the pay. The respondent promoted the applicant from being a domestic servant to be a shop assistant in order that she may earn more money as she had a number of children to look after. The applicant is a single parent of six children.

She was earning E850:00 per month. In terms of the Wages Order she was supposed to be paid E917:38 as a shop assistant. Taking into account all these factors the court will award her an equivalent of twelve months' pay as compensation for the automatically unfair dismissal amounting to E11,008.56.

[15] The court will also order the respondent to pay to the applicant the following terminal benefits;

| | | |
|--------------------------------------|-----|--------------------------|
| 1. NOTICE PAY | = E | 917.38 |
| 2. ADDITIONAL NOTICE (E30.22x3x4) | = E | 362.60 |
| 3. SEVERANCE ALLOWANCE (30.22x3x10)= | E | <u>906.60</u> |
| TOTAL | | <u>E 2,186.62</u> |

The respondent is also ordered to pay the costs of suit.