IN THE INDUSTRIAL COURT OF ESWATINI

CASE NO.204/2020

IN THE MATTER BETWEEN:

MAXWEL NDZIMANDZE	First Applicant
VUSI DLAMINI	Second Applicant
QUEENETH DLAMINI	Third Applicant
NDUMISO MBATHA	Fourth Applicant
JEREMIAH TSAMBOKHULU	Fifth Applicant
BONGILE MAMBA	Sixth Applicant
MATHOKOZA NKAMBULE	Seventh Applicant
MSINDISI MATHABELA	Eighth Applicant
NOMCEBO DLAMINI	Ninth Respondent
NTOMBI MAGONGO	Tenth Applicant
SIBONGILE MOTSA	Eleventh Applicant
SIZAKELE SHONGWE	Twelfth Applicant
SWAZILAND AGRICULTURAL AND PLANTATIONS WORKS UNION	Thirteenth Applicant

AND

SWAZILAND RANCHES LTD T/A
TAMBANKULU/ UMBULUZO ESTATE Respondent

NEUTRAL CITATION: Maxwel Ndzimandze and 12 others vs Thabankulu/Umbuluzi Estate [75/2020] SZIC 122/75 [2020]

CORAM: BW MAGAGULA - ACTING JUDGE
(Sitting with Miss.N.Dlamini & Mr. D.Mmango) Members of the Court)

DATE HEARD : 2nd September 2020

DATE HANDED DOWN : 10TH September 2020

SUMMARY: *Urgent Application to challenge noncompliance of S 40 of the Industrial Relations Act of 2006 (as amended). Respondent alleged to have written retrenchment letters to the 13th Applicant member's prior to consulting with the union. Importance of following a fair procedure before effecting retrenchments emphasized. Application granted with costs*

JUDGEMENT

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1. The 1st to the 12th Applicants are unionized employees of the Respondent. The 13th Applicant is the Swaziland Agricultural and Plantation Workers Union, A union registered and recognized by the Respondent as the sole representative of all employees of the Respondent within it's bargaining Unit.

2. The Respondent is Swaziland Ranches Ltd which also carries business as Tabankulu estate it is a member of the Tongaat Hulett. The recognition and procedural agreement between the parties, is part of the papers filed before Court and it is marked annexure "T2"

BACKGROUND FACTS

3. The dispute between the parties, emanate from a letter that was issued by the Respondent on the 2nd of June 2020. In that letter, the Respondent set out a background to the union. It reflected on cost cutting initiatives that had been embarked on by it, since the year 2019. Employees across all sectors of the company had been invited to make suggestions on how the company could cut down on all none-core expenditures. Respondent alleged in the aforesaid letter, that the Tabankulu club was identified as one of the business units which was not profitable and needed to be closed due to the COVID 19 pandemic, a catastrophe that has affected the whole world. The Respondent had to temporarily close the club, due to regulations hat were enacted under the Disaster Management Act by the Eswatini Government, as a response to the pandemic .

4. In the same letter, the Respondent was advising the 13th Applicant, that it would no longer afford to defer the permanent closure of the club any longer. As a consequence thereof, the letter was a formal notification by the Respondent that it will permanently close the club. In that letter, Respondent further advised that the closure of

the club may possibly lead to the retrenchment of employees falling within the bargaining unit of the 13th Applicant. The company went further to advise that consultation between it and representative of employee organizations were expected to run from the 15th of June 2020 to the 19th June 2020.

5. The Respondent further pronounced that, the period of notice as prescribed by S 40 of the Employment Act of 1980 will run from the 1st of July to the 31st of July 2020.

6. The company also indicated that it will engage the commissioner of labour on the process, to ensure compliance with all statutory obligations.

7. One of the issues that is contended by the Applicant, is that the consultations as indicated in the Respondent's letter which were scheduled for the 15th to the 19th of June 2020, did not materialize on the intended dates. The 1st meeting only took place on the 29th of June 2020.

ANALYSIS OF FACTS AND EVIDENCE

8. The importance of effecting a fair procedure before the termination of an employment, cannot be over emphasized[1]. The retrenchment letters were issued to the employees on the 29th of June 2020. The commissioner of labor was notified simultaneously with the 13th

[1] Mecco Maseko and Another vs Inyatsi Construction IC case no.64/2003 at paragraph 115

applicant on the 14th of July 2020. The alleged consultation happened on the same date as the retrenchment letters, which was on the 29th of June 2020

9. In it's answering affidavit, the Respondent had initialy taken two points of law. The *non-joinder* of SAMASA[2] and other employees. Respondent had initially also contended that, the 1st to the 12th Applicants, do not form part of the list of the executive committee members of the union that was communicated to it. As such, they do not have the requisite *locus standi in judicio,* to institute the current proceedings. After the Applicants had filed their replying affidavit and addressed this issue and annexed documentation. The Respondent's counsel at the commencement of the hearing, conceded that the points of law taken, are no longer in issue. It is on that basis, that the Court will not determine these points of law.

10. The Applicants are before Court are seeking the following prayers as set out in their notice of motion:-

- *"Declaring the conduct of the Respondent to consult and/ or deal directly with union members prior to engaging the union unfair and unlawful and undermines the unions's right.*

[2] SAMASA is another union recognized by the Respondent

- *Declaring the notices of Redundancies issued by the Respondent dated 2nd June 2020, 29th June 2020 and 14th July 2020 invalid and unlawful for contravening section 40 of the Employment Act 1980 (as amended).*

- *Setting aside the notices issued by the Respondent on the 2nd June 2020, 29th June 2020 and 14th July 2020.*

- *Declaring that the Respondent is obligated to compute terminal benefits for employees that may be redundant in terms of the agreement dated the 20th January 2006.*

- *That prayer 3.1 operates with immediate and interim effect*

FAILURE TO CONSULT THE UNION AND DEALING DIRECTLY WITH UNION MEMBERS PRIOR TO ENGAGING THE UNION

11. The Applicants argue that the Respondent failed to engage in consultation with them prior to effecting the retrenchments. In fact, intertwined with that argument is that the Respondent breached the recognition agreement, by consulting directly with the union members, behind its back.

12. When responding to this allegation, the Respondent in paragraph 20 of its answering Affidavit states that the allegations are firmly denied. Respondent further state that the consultation did not initially proceed as contemplated on the 2nd of June 2020.

Respondent refers to the consultative meetings of the 29th of June 2020. Respondent further avers that the 1st consultation, regarding the decision that the company had taken, took place on the 27th of April 2020. When we analyze and go through the minutes of the meeting which are on page 89 of the book of pleadings, there were two agenda headings that formed part of the discussions. We will not traverse in this judgment the entire contents of the minutes as the minutes, are self-explanatory and form part of the evidence before Court.

13. The issues that were discussed in that meeting were the effects of COVID 19 in the next 12 months (even after lock down). The participants were being informed by Mr Sipho Nyoni, representing management, that the club will be closed due to the COVID 19 pandemic.

14. The second issue of discussion was that the club employees would be paid 75% of their salary, for three months.

15. The Respondent did not address the averment contained in Applicant's application, to the effect that they went behind the union to inform their members directly, about the retrenchment. Secondly, the minutes that are refered to, are not related to the decision by the Respondent to retrench. The minutes deal with the closure of the club, as a consequence of the covid 19 pandemic.

16. The consultation regarding the redundancy effectively began on the 29th of July 2020. That is when the union was engaged and that is exactly when the union was invited to give it's submissions on the issue. Ironically, it is exactly the same day that the Respondent had written letters directly to the members of the 13th Applicant advising of their retrechment.

17. It is therefore our observation that the Respondent had not engaged the 13th applicant, prior to issuing the retrenchment letters. At the time the meeting commenced, at 10 a.m, the members had already received their letters

18. The Applicants have also attacked the notice of retrenchment letter which was issued by the Respondent. They allege that it does not comply with the provisions of S 40 of the Employment Act of 1980. They argue that they are aggrieved with it because in as much as it appears to comply with S 40, but it was issued after the decision to retrench had already been taken. Applicants further argue that the letter lacks the particulars prescribed by the law, to facilitate meaningful consultations with the union. The Applicants went further to argue that the letter dated the 14th July 2020, does not have the latest financial statements and audited accounts of the undertaking (our own emphasis) but it only contains management accounts of the club which is run by the undertaking.

19. We deem it important, to consider what the provisions of S 40 of the Employment Act of 1980 as amended it states the following:-

40 (1) for the purposes of this section the term employee shall be deemed not to include any employee-

a) Engaged on a seasonal contract;

b) Engaged on of fixed contract of six weeks or less which does not provide for the engagement at the end the period;

c) Which is a casual employee.

Where an employer contemplates terminating the contract of employment of five or more of his employees for reasons of redundancy, he shall give not less than one month's notice thereof in writing to the labour commissioner and to the organization if any with which is a party to a collective agreement and such notice shall include the following information:

a) Number of employees likely to become redundant:

b) The occupations and remuneration of the employees affected:

c) The reason for the redundancies:

d) The date when the redundancies are likely to take effect e) the latest financial statement and audited accounts of the undertaking;

f) What other opinions have been looked into to avoid or minimize the redundancy

20. The Act in S (2), states clearly that the employer must give not less than one month notice in writing to labour commissioner and to the union at the time the employer contemplates terminating the contacts of employment

21. The Act does not say the notice must be given when the retrenchment notice has already been served on the employees. This appears to have been the case, in the matter at hand.

22. The Respondent issued retrenchment letters on the 29th June 2020 to the Applicants. After the retrenchment letter had been issued, then later on 14th of July 2020, it is only then that a notice in terms of section 40 (2) was issued.

23. This procedure adopted by the Respondent, is not in line with what is prescribed in the Act. It is defective.If we consider the notice issued to the labour commissioner dated the 14th of July 2020, at paragraph 2.1, the reason for retrenchment is stated as follows:
This business unit was not making profit and was operating at a loss.

24. In the opening paragraph of the letter to the labour commissioner, the Respondent advised that it intended to embark upon a restructuring exercise of one of its business units, being the

Tambankulu recreational club. We can only deduce from the letter, that restructuring in the context of the Respondent, meant total closure.

25. In paragraph 1.1 of the same letter, Respondent tells the labour commissioner and the union simultaneously, that this restructuring may possible result in the retrenchment of 9 employees. The Respondent does not mention to the labour commissioner that, it had already effected the retrenchment by serving the affected employees with the retrenchment letters as way back as the 29th of June 2020. This was not only misleading to the labour commission but a contravention of the Employment Act as this provision of the law states that it is at the point where the employer contemplates to terminate, that he shall give the notice. Not at the time when the notice of retrenchment letters have already been issued to the affected employees

PROVISION OF LATEST FINANCIAL STATEMENTS AND AUDITED ACCOUNTS OF THE UNDERTAKING

26. In section 40 (2) e the Act [3] , makes it mandatory that the latest financial statements and audited accounts of the undertaking must be included in the information to be furnished to the labour commissioner and to the union pertaining to the undertaking that is retrenching the employees. In this instance, the Respondent in its own letterhead, the undertaking that is registered as a corporate

[3] Employment Act of 1940 as amended

entity, is Swaziland Ranches limited. At the bottom of its letter head it is stated that it trades as Tambankulu estates Limited. That is the undertaking that is registered and it is that undertaking that has been cited as a Respondent in this application before Court.

27. The Respondent has not pleaded that the recreational club enjoys a separate corporate personality Swaziland Ranches Limited it is on that basis, that we deduce that the latest financial statements and audited accounts that the respondent was supposed to furnish the 13th Applicant and the labour commissioner, to be those of Swaziland Ranches Limited not Tabankulu club.

MEMORANDUM OF AGREEMENT ON THE TERMINAL BENEFITS FOR REDUNDANT EMPLOYEES.

28. The Applicants have also argued that there is an agreement that was entered into and signed by the parties dealing with terminal benefits for redundant employees. The Applicants argue that the Respondent intends to partly comply with this agreement. In part 1.3 of the agreement for the payment of 14days per each completed year of service, there is no provision yet the Respondent internds to pay just one month.

29. The Respondent when responding to this specific averment stated as follows in it's answering affidavit.

"Contents hereof are denied. The 2006 agreement was specific to

the 2006 retrenchments agreement and it is not a standing agreement. Even from a plain reading of the agreement it appears that the retrenchment package was specific to the 2006."

30. The agreement is part of the annexures before Court marked AA5. We have scrutinized the agreement. There is no where it says this agreement will apply strictly to the year 2006. Where the year 2006 is mentioned, is in paragraph 1.6, where the agreement deals specifically with education assistance prior to the year 2006. It says it will benefit hourly paid employees, E2, 500.00 per family. Permanent staff and E5, 000.00 per family. Then below that, it is stated clearly that this assistance, which is the education assistance will be for the 2006 academic year only. The relevant sentence does not state that the memorandum of agreement in respect of the benefits from redundant employees will be for the year 2006 only.

31. This being a written agreement by the parties, it largely satisfies all the ingredients of a written contract. It must thereafter bind both parties. Christie! **the Law of Contracts in South Africa Fourth Edition 2001** (at page 122) the learned author stated that a written contract comes into existence when it is signed by all parties. Annexure "AA5" is clearly headed that this is a memorandum of agreement between 13th Applicant and the Respondent.

32. In paragraph 1.3 it states that *ex-gratia* pay must be computed at 14 days per completed year of service, capped at 20 years. There is

no reason why the Respondent should not be bound by contractual obligation which it signed for the union.

33. In terms of the Employment Act of 1980 (as amended)[4], the employer has the onus to prove that retrenched employees are redundant and that the retrenchment process is procedurally fair.

34. We accept that it is part of the prerogative of an employer in terms of S 36 (J) of Employment Act no.5 of 1980 as amended, to retrench a redundant employee. However, the employer must provide a *bona fide* reason to retrench. As Mazibuko J put it, in the judgment of Mecco Maseko vs Inyatsi superfos[5] *the retrenchment must not be used as a guise to remove unwanted employees from the work place. The retrenchment and the procedure to be followed to effect it, must be fair.*

35. Every employer who is faced with a necessity to retrench, must consult the employee concerned or the employee representative[6]. We cannot put it as succinctly as Mazibuko J did in paragraph 116 of the Neco Maseko judgment, where he stated as follows:-
"with regard to the importance of consultations prior to retrenchments "Consultation gives the employer an opportunity to explain the reason for the proposed retrenchment. This is the point where the employer will demonstrate with supporting evidence

[4] S 42 (2)
[5] supra
[6] See paragraph 1115 of the Nico Maseko judgment

that the suggested retrenchments is bona fide and necessary for the survival of the undertaking"

36. In the matter at hand we fail to appreciate when would the employees have an opportunity to make meaningful inputs to the retrenchment exercise, when they were given the retrenchment letter the very same day their union were to meet management. Even if they were expected to make their inputs through the union, the time frames were just too constrained to enable the employee to do a proper briefing. They got the retrenchment letters on the same day the union was to engage management. We further find that the failure to provide the financial statements of the Respondent and only to provide the financial statements of the club, which on their own have not been demonstrated to have been audited, deprived the 13th Applicants the opportunity to interrogate the financial position of the Respondent. There are many possible areas the union may wanted to engage on including in whether the Respondent had the financial capability to absorb the affected employees in other departments within the Respondents. To explore whether the Respondent had the necessary financial muscle to deploy them or even equip them with necessary training to perform other tasks in the other departments. In which case they would have been informed to make meaningful contributions in the consultative meeting, when they would have been armed with all the necessary financial information of the Respondent not the club.

37. It has been widely held that consultation is an indispensable process, in a fair retrenchment which duty the employer cannot abdicate [7]

COSTS

38. One of the prayers that is sought by the Applicants is for is for costs. We are alive that this Court generally is loath to make an order for costs where the employee/ employee relationship still exists, in a bid to promote harmony in the work place[8]. In the matter at hand, we seek to express our disapproval in the manner in which the Respondent misrepresented facts in their letter to the labour commissioner. Respondent stated that the restructuring may possible result in a retrenchment of 9 employees, when in fact the employees had already been served with the retrenchment letters. To mark our disproval, we will order that Respondent bears the costs of suit at an ordinary scale.

For the foregoing reasons, we will grant prayers 1, 2, 3.1,4,5,6,7 and 9 of the Applicant's Notice of Motion dated 20th August 2020.

The Members agree.

B.W. MAGAGULA
ACTING JUDGE OF THE INDUSTRIAL COURT

[7] See Phyllis Phumzile Ntshalintshali vs small enterprise development company case no.88/2008 (Ic) page 13
[8] See Swaziland Post and Telecommunications Workers Union and Two Others vs Phumelela Shongwe n.o and Swaziland Post and Telecommunication Corporation Case No.506/15 at paragraph 23

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : *MR.L HOWE*

FOR RESPONDENT: *MR. M SIBANDZE*