IN THE INDUSTRIAL COURT OF SWAZILAND

Case No 314/2020

In the matter between:

SABELO DLAMINI AND 11 OTHERS Applicant

And

MBALENHLE CHRISTIAN ACADEMY pt Respondent
(Duly represented by Thabsile Gumbi)

THABSILE GUMBI 2nd

Respondent 3rd

THE COMMISSIONER OF LABOUR

THE ATTORNEY GENERAL Respondent 4th

Respondent

Neutral citation: ***Sabelo Dlamini and 11 Others v Mbalenhle Christian Academy and two Others*** *(314/20) (2021) [SZIC 70] (07 October 2021)*

Coram: **NGCAMPHALALA AJ**
(Sitting with N. Dlamini and M P. Dlamini, Nominated Members of the Court)

Date Heard: 10 December 2020

Date Delivered: 07 October 2021

SUMMARY: Applicants instituted an urgent application for an order directing the Respondent to pay two months arrear salaries and a declaration that their layoffs was null and void- points in limine raised- resume of relevant facts urgency

Held - Points in limine dismissed-application granted.

JUDGEMENT

---

[l] The Applicant is LiSwati male adult currently employed by the pt Respondent as a teacher based at Ngculwini area in the Manzini Region.

[2] The 2nd Applicant is Sandile Zwane, 3rd Applicant is Sunday Msibi, 4th Applicant is Nelile Simelane, 5th Applicant is Lomalungelo Dlamini, 6th Applicant is Luyanda Msimango, 7th Applicant is Neliso Dlamini,8th Applicant Lynette Horton, 9th Applicant is Bhekumuzi Magongo, 10th Applicant is Vuyisile Msibi, 11th Applicant is Nelsiwe Ngcamphalala and the 12th Applicant is Sibusiso Tsabedze. All the Applicants are employees of the 1st Respondent based at Ngculwini in the Manzini Region.

[3] The 1st Respondent is Mbalenhle Christian Academy, a school registered as such with its place of business at Ngculwini in the Manzini Region duly represented by Thabsile Gumbi, 2nd Respondent herein in her capacity as the sole owner and director of the school.

[4] The 2nd Respondent is Thabsile Gumbi, a LiSwati female adult who is the Managing Director of the 1st Respondent, cited in her capacity.

[5] The 3rd Respondent is the Commissioner of Labour cited herein in his capacity as such, with his offices in Mbabane in the Hhohho Region.

[6] The 4th Respondent is the Attorney General cited herein in his capacity as the legal representative of gove1nment in all legal proceedings.

[7] BRIEF BACKGROUND

The Applicants are EmaSwati maJors employed by the Respondent in various capacities. The Applicant has approached the Comi under a certificate of Urgency, seeking an order in the following terms:

7.1 Dispensing with the nonnal time limits and forms of services and enroll this matter as an urgent one.

7.2 A Rule Nisi do hereby issue calling upon the Respondents to show cause why the following order should not be made final.

7.3 Reviewing and/or setting aside the decision of the Respondents as reflected in the letters dated the 1st November, 2020 laying -off the Applicants from work from the 1st November, 2020 until the 31st January 2021.

7.4 Directing the Respondents to refund the Applicants salary deduction for May and June 2020, in the total sum ofE102,376.04 (one hundred and two thousand three hundred and seventy-six emalangeni four cents).

7.5 Directing Respondents to pay costs of suit at attorney/client scale.

7.6 Granting application further and/or alternative relief.

[8] The Applicants Application is opposed by the 1st and 2nd Respondent and an answering affidavit was duly filed and deposed thereto by the Respondent, Ms. Thabsile Gumbi. The Applicants thereafter filed their Replying Affidavit.

[9] The 3rd and 4th Respondent did not file any opposing papers and advised the Court that they would abide by the Courts decision. The matter came for arguments on the 10th December, 2020, and the court dealt with the points *in limine* raised by the Respondent and the merits.

[10] POINTS IN LIMINE

Through the answering affidavit of Thabsile Gumbi the 2nd Respondent raised the following points ***in limine.***

Resume of relevant facts

Lack of Urgency

[11] RESUME OF RELEVANT FACTS

It was the 1st and 2nd Respondent's argument that the Court should not intervene in circumstances where an employer has followed due process in trying to mitigate loss of employment, whilst on the other hand employees

are adamant of their positions of getting full salaries and refuse to be laid off. The 1st and 2nd Respondent averred that the lay-offs and salary deduction, were enforced by themselves in accordance with the **Guidelines on Employment Contingency Measures in Response to the Coronavirus Covid 19.** Further that same was enforced after carrying out due process in terms of the guidelines. The need to enforce same were necessitated by the financial position of the 1st Respondent, which had suffered financial hardship as a result of the pandemic.

[12] Premised on the aforesaid it was the pt and 2nd Respondent's argument that the application is vexatious and lacks the appreciation from the Applicants of the 1st Respondent financial situation. The Court has extensively considered the 1st and 2nd Respondent, and finds that the point *in limine* has no merit, and therefore the point *in limine* fails.

[13] URGENCY

Turning to the second point *in limine,* it was the Respondent's argument that the matter was served on the 1st Respondent on the 10th November, 2020 for relief emanating from issues dating back to March, 2020. 1st and 2nd Respondent argued that it is a clearly inconceivable why the Corni

almost eight months later would be called to set aside its business and hear the matter on an urgent basis. The 1st and 2nd Respondent argued that the deductions were affected and concluded in April 2020, and that when same were affected, the Applicant never complained.

In the case of NELSIWE FAKUDZE V SWAZILAND BUSINESS COALITION ON HEALTH AND AID (339/2016) SZIC 58 the Comt stated;

"Failure to pay monthly salary of an employee amounts to breach of the terms of the contract of employment. In a case where the employer/employee relationship still subsists, failure to pay wages of the employee is a ground for urgency. The point of law is therefore dismissed."

[14] This principle was also affi1med in the case of **GRAHAM RUDOLP V MANANGA COLLEGE INDUSTRIAL COURT CASE NO 94/2007** and in the case of **BONKHE LUKHELE V SDFC INDUSTRIAL COURT CASE NO 39/2008.** It is trite law that matters dealing with salaries in their very nature are urgent. The Applicants content that their salaries were unlawfully deducted without their consent and approval, the

Court cannot tum a blind eye as such matters deal with the livelihood of the Applicants. Consequently, the point *in limine* falls to be dismissed.

[15] MERITS

ANALYSIS OF FACTS AND LAW

The Applicc1nts submitted that on the 18th March, the Right Honuornble Prime Minister, on behalf of the government of Eswatini declared a state of emergency due to the outbreak in the world of Covid 19. Following that declaration, government put in place several policies in the form of guidelines to be followed by the various sectors of society including employers.

[16] It was the Applicants submission that as employees, government also put in place guidelines to be followed by the employer in the event the employers contemplated, due to special/or specific circumstances to undertake actions such as lay-offs or non-payment of salaries etc. This information was published by government in term of **Legal Notice No. 22 of 2020, Guidelines for Employment Contingency Measures in Response to the Coronavirus Covid 19.** In terms of these guidelines, the employer is

enjoined to consult, and agree with employees before effecting any decision, be it lay-offs and/or salary cuts, and the record of such consultation be availed to the Commissioner of Labour. Further after consultation, such decision that the parties may come into, does not take effect until approved by the Commissioner of Labour.

[17] It was the Applicants submission that contrary to the prov1s10n of the guidelines on employment contingency measures, as promulgated by the government of Eswatini, the 1st and 2nd Respondent, in the month of May and June 2020, unilaterally effected cuts on the Applicants salaries. The Applicants aven-ed that this was not preceded by any consultation nor communication between the Employer and Employees, fmiher the 1st and 2nd Respondents did not have approval from the Commissioner of Labour. As a result of the salary deductions the 1st Respondent payment of salaries to the Applicants for the month of May and June 2020 had a shortfall of **E102,376.04.**

[18] It is the Applicant's argument that the salary deductions for the month of May and June 2020 in their salaries were not by consent, pennission, nor

were they consulted by the 1st and 2nd Respondent. Applicants further averred that the act by the 1st Respondent ***ex facie*** were contrary to the labour laws of the country and the Contingency Measures in Response to the Coronavirus Covid 19 Guideline as issued by the Commissioner of Labour. The Applicants fmiher submitted that 1st Respondent unilaterally terminated their pension, without any notice nor consultation with the Applicants, however in the letter of tennination to the pension corporation the reason for termination was that same was at the instance of the Applicants.

[19) The Applicant further submitted that on the 19th October, 2020 the 2nd Respondent informed the Applicants that there would be a fmiher cut to their salaries for the month of October, 2020, as it was facing financial problems. The Applicant duly objected to the cuts through a memorandum on the 20th October, 2020, and as a result no salary cuts were affected. Several meetings were held between the patiies on the 19th, 2ŝ1 t and 26th October 2020, in the said meetings the 2nd Respondent informed the Applicants that there would be salary cuts, and fmiher provided the financial records of the 1st Respondent. However, the Applicants objected to the salary cuts/deductions, and in turn sought the intervention of their Counsel, who in turn sent

co1Tespondence to the 1st Respondent and demanded the refund of monies

deducted in May and June 2020. No response was received form the 1st Respondent, instead on the 2nd November, 2020, c01Tespondence was received for the 2nd Respondent informing the Applicant of intended lay-offs effective from the 1st November, 2020 until the 31st January 2021

[20] The Applicants upon receipt of the lay-off notices, approached the office of the Commissioner of Labour, where the Applicants were advised that the 1st Respondent had applied for the lay-offs, and that same were still under consideration. Therefore, at the time of effecting the lay-offs the 1st Respondent did not have the approval of the Commissioner of Labour. Further it was the Applicants submission that the lay -offs were further unlawful as the guidelines provided for lay- offs for a period of two months, whilst the 1st Respondent was affecting same for a period of three months. In addition to that the State of Emergency as gazette was valid until the 17th November, 2020, therefore it was unlawful and wrong for the 1st Respondent to extend the lay-offs beyond that period.

[21] Accordingly, it was the Applicants argument that the decision of the pt Respondent to lay-offs the Applicants was reviewable, grossly in-egular, unreasonable and unlawful on those grounds. The 1st and 2nd Respondent

are opposed to the present application, and have file an Answering Affidavit deposed to by Ms. Thabsile Gumbi, the Director of the 1st Respondent, who is also the 2nd Respondent herein. It was the 1st and 2nd Respondent's argument that the school is privately owned and operates on school fees paid by parents. It is their contention that on the 31'1 January, 2020, the 1st Respondent began restructuring process at the school due to the low intake of students at the school.

[22] It was further submitted that there was a drastic decline in the intake of students in school experienced over a four-year period, the 1st and 2nd Respondent submitted that as a result of the decline discussion were held with staff members, commencing February 2020, to March 2020, on redundant posts, and a new organogram of the school. Discussions were also held regarding possible retrenchments, and the office of the Commissioner of Labour was advised accordingly. Evidence to that effect was annexed. It was the 2nd Respondent's submission that as a result of the retrenchments, exit packages were prepared and in March, 2020, the first group of retrenched employees received their packages. Salary cuts were also introduced to other staff members during this period. It was the 2nd Respondent's avennent that following the retrenchment and adoption of

salary cuts, the position of the school worsened due to the Covid 19 pandemic.

[23] The 2nd Respondent further submitted that on or about the 8th May, 2020, during a meeting with the Applicants, the struggles of the 1st Respondent were explained and the Applicants were advised that salary cuts would again be implemented to safeguard jobs. It was the 2nd Respondents submission that the Applicants were advised that the salary cuts/deductions would be effective at the end of May, 2020. The 2nd Respondent argues that the pay cuts were to continue until the month of October,2020, culminating to the lay-offs, of some of the employees if the situation at the school was not improving.

[24] It was submitted that on the 19,2lst, and 26th October, 2020, the 2nd Respondent engaged the Applicants again and fully explained the financial position of the 1st Respondent, and further advised them of a fifty percent pay cut/deduction, which the Applicants were not amenable too. The 2nd Respondent averred that on the 27th October, 2020, after an application by the 1st Respondent to the Commissioner of Labour in terms of **Section 5**

(a) of the C ntingency Measures in Response to Covid Guidelines, the lay-

offs were approved. It was the **1st** Respondent's argument that on the backdrop of these facts, the present application was vexatious and lacked the appreciation by the Applicants of the 1s.t Respondents financial difficulties.

[25] The 1st and 2nd Respondent submit, that the lay-offs complained about have been conducted in line with the Contingency Measures in Response to Covid Guidelines, in response to the Covid 19 pandemic and with the total approval of th' e Commissioner of Labour in lieu of a total retrenchment of the Applicants. It was their prayer that the Application be dismissed.

[26] It is common cause that amid the national lockdown and to mitigate against further economic hardships on both employers and employees, on April 14, 2020 the Government of the Kingdom of Eswatini issued ***The Guidelines on Employment Contingency Measures in Response to the Coronavirus (COVID-19) Pandemic Notice No. 22 of 2020*** to provide for temporary employment contingency measures aimed, inter alia, to mitigate against the effects of loss of earnings and jobs by employees.

[27] **Section 3** provides that the purpose and objective of these Guidelines to name just a few which have a direct bearing in this matter is to: -

"(a) Provide for temporary employment contingency measures which are meant to mitigate against the effects of loss of earnings by employees;

(b) *Legitimize various temporary employment contingency measures which are meant to mitigate against job losses;*

(c) *Suspend Eswatini National Provident Fund contributions and divert funds towards payments of wages and salaries for the months of April and May, 2020;*

(d) *Provide/or standard measures on Workplace Governance during the period of national emergency;*

(e) *Promote workplace related social dialogue (consultations) between employers and employees in respect of all employment contingency measures that are deemed appropriate during the period of the partial lockdown or national emergency, as the case may be;*

(j) To safeguard the rights of employers in managing their businesses;

(g) To safeguard the rights of employees from unfair labour practices disguised as employment contingency measures in response to the emergency situation;

[59] Measures that are meant to mitigate against the effects of loss of earnings are provided for under ***section 4*** *of the Guidelines and pertinent to this application are subsections (d) and (e) respectively.*

Section 4 *and the pertinent subsections thereof provide as follows, .to wit: -*

4. Employers are encouraged to continue to pay their employees, where this is not economically possible, employers, in consultation with a recognized employees ' organization or employees ' representative structure within the enterprise and the Commissioner of Labour, are to consider the following options to mitigate against the effects of loss of earnings by their employees during the partial lockdown or the entire period of the national emergency .... ''

Section 5 provides, *In the event that any of the measures that are meant to mitigate against the effects of loss of earnings are exhausted, the following guidance is provided to employers and employees-*

a)Lay -offi- In unlikely event that any unpaid lay-off become inevitable due to severe economic constraints and in an effort to mitigate against immediate job losses (or retrenchments) during the period of national emergency, employers across 9/l industries or businesses without differentiation, acting in consultation with a recognized employees organization or employees' representative structure within the enterprises, may consider laying off employees for any period not exceeding two months, provided such unpaid layoff is approved by the Commissioner of Labour .....

[27] A reading of both **Sections 3** and **4** of the **Covid 19 Contingency Guidelines** emphasize on the significance of social dialogue and/or consultation between employers and employees, employers and employees' representative structure within the enterprise and the Commissioner of Labour in considering the prefe1Ted option(s) to mitigate against the effects of loss of earnings by employees during the partial lock.down.

[28] The crisp questions to be determined by this Court to dispose of this matter is whether the Applicants were consulted by the 1st and 2nd Respondent, before the lay-off and deductions to their salaries. Further when effecting these lay offs and deductions did the 1st and 2nd Respondent comply with the Contingency guidelines. Lastly validity and legality of the approval by the Labour Commissioner dated 10th November, 2020

[29] This Court finds that consultation in the context of retrenchments is akin to the consultation required of any employer in considering the prefe1Ted option(s) to mitigate against the effects of loss of earnings by employees during the partial lock.down under the prevailing Guidelines. Henceforth the

opm10ns of legal scholars and legal authorities relied upon in cases of retrenchments in as far as they relate to the meaning of consultation will be equally relevant to the matter at hand.

[30] It is the 1st and 2nd Respondent's argument that the Applicants were consulted prior to the coming into effect of the deductions to the Applicants salaries in May and ,une 2020, and further consultation before the lay-offs. In support of these averments the 1st and 2nd Respondent annexed minutes of meetings

held on the 12th "nd 30 th March 2020, further meetings that were held on the 8th May, 2020, 19th ,2ist, 26th October, 2020. Upon close scrutiny by the Court of the minutes, it is evident that the minutes of the 12th and 30th March 2020, were meetings held between the 2nd Respondent and one Ms C Khumalo and are not relevant to the present case.

[31] The minutes of the 8th May 2020 were in part for heads to give updates on ongoing online learning, and furth r for the Director to inform the staff of the school financial distress, and the drastic measures that they may need to take as a school if the situation did not improve. Nowhere does it appear that the purpose of the meeting was to consult with the Applicants, and this is evident from the wording of the minutes. It is only in the subsequent meeting

held where the 2nd Respondent purports to then discuss the issue of salary deductions and lay-offs.

[32] In METAL & ***ALLIED WORKERS UNION V HART LIMITED (1985) 6ILJ 478(IC)*** the court held that 'to consult means to take counsel or seek information or advice from someone and does not imply any agreement ...

Grogan Workplace Law (2017) states that consultation must be exhaustive and thorough, not merely sporadic, superficial or a sham. Concerning an employer who approaches a consultation predisposed to a particular solution, the trend has not been to necessarily hold that it was a mere pretence unless the employer fails the test set out in, **SATAWU** & ***OTHERS V ROADWAY LOGISTICS (PTY) LTD (2007) 28ILJ 2863 (LC).*** The test is whether management retained a mind sufficiently open to be persuaded by practical and rational alternatives.

[33] The question to be detennined now by the Court, is whether the Applicants were consulted on the deduction effected in May and June ,2020. Fmther were the Applicants consulted on the intended lay-offs effected on the 1st November ,2020. In terms of **Section 4** of the **Contingency Measures for**

Covid 19 Guidelines, employers m consultation with recognized employees' organization and the Commissioner of Labour are to consider the measures stipulated in that section that are meant to mitigate against the effects of loss of earnings by the employees. There is nothing in the minutes of the 19th, 21st, 26th October, 2020, that shows that the measures were considered by the parties in consultation with the Commissioner of Labour. Put differently the 1st and 2nd respondent have failed to prove that they sought advice or the option of the Commissioner of Labour before deciding that the measure eventually taken were applicable. **Section 5** of the regulations provide those interim measures for workplace governance such as layoffs should be considered after exhausting the measures provided in **Section 4.** This section further provides for layoffs by an employer for a period not exceeding two months, it however stipulates that such unpaid lay off shall be approved by the Commissioner of Labour.

[34] For the avoidance of doubt this Court is of the view that the 1st and 2nd Respondent failed to consult the Applicants in terms of **Section 4** of the guidelines, on the deductions that were affected in May and June 2020, and the subsequent lay-offs effected in November, 2020. The Court further avers

that at the time of the purported consultations on the salary cuts, the 1st and 2nd Respondent had already affected the salary deductions. Further it is evidence from the c01respondence granting approval by the Commissioner of Labour for the lay-offs, that same was addressed on the 10th November, 2020, meaning the Commissioner of Labours approval was granted on the 11th November, 2020, however the Labour Commissioner approved the lay offs retrospectively. The Court will not deal with the issue of the legality of the Commissioner of Labours retrospective approval of the lay-off as it has found that the 1st and 2nd respondent have failed to meet the requirements of **Section 4** of the Covid Guidelines. Further the Commissioners approval did not prejudice the Applicants claim for May and June 2020. See the case of **LUNGILE MANGO AND SIX V LSM DISTRIBUTERS (PTY) LTD INDUSTRIAL COURT CASE NO. 219/2020** and **SWAZILAND NATIONAL TRUST COMMISSION STAFF ASSOCIATION AND THREE OTHERS V ESWATINI NATIONAL TRUST COMlYIISSION AND TWO OTHERS INDUSTRIAL COURT CASE NO. 183/2020.**

[35] Based on the above reasons the Court holds that the 1st and 2"d Respondent's decision to deduct salaries and effect lay offs was done in breach of the **Covid 19 Contingency Guidelines.**

[36] Taking into account all the circumstances of the case, the interests of justice, fairness and equity, the Comi will make the following order:

ORDER

(i) The application is granted.

(ii) The Respondents decision of laying off the Applicants dated the 1'[1] November, 2020, is set aside.

(iii) The 1'[1] and 2[nd] Respondent are directed to refund the Applicants the salary deduction for the month of May, 2020, and June, 2020.

(iv) There is no order as to costs.

The Members Agree.

B. NGCAMPHALALA
ACTING JUDGE OF INDUSTRIAL COURT OF SWAZILAND
TH

For Applicant: Mr. S. Madzinane (Madzinane Attorneys).

For Respondent: Mr. H. Magagula (Robinson Betram).