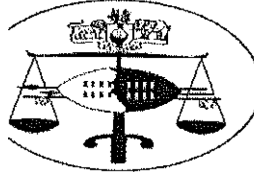

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 162/2016

In the matter between:-

BONGANINHLEKO APPLICANT

And

AG THOMAS (PTY) LTD RESPONDENT

Neutral citation: Bongani Nhleko v AG Thomas (Pty) Ltd (162/2016) [2021] SZIC 75 (29 September 2021)

Coram: **THWALA - JUDGE**
(Sitting with Ms N. Dlamini and Mr. D.P.M. Mmango, Nominated Members of the Court)

Heard: 04 August 2021.

Delivered: 29 September 2021

JUDGEMENT

Background

1. This matter had a chequered history. It was first launched as an application for the determination of an unresolved dispute wherein Applicant claimed

for Notice pay; additional notice pay; leave pay; severance allowance and maximum compensation for unfair dismissal. This application was issued out of this Court on the 31 May 2016. Then on the 3 August 2017, Applicant decided to file for another claim, this time by notice of motion, in which he sought for an order compelling Respondent to pay him his arrear wages.

2. Both proceedings were opposed, which then led to the prolongation of the finalisation of the matter as well as the unnecessary clustering of the record. In the encl, the two (2) applications were then consolidated into one such that when the matter finally came before this Court, two (2) items were there for adjudication, *viz:*

2.1 The fairness and/or otherwise of Applicant's dismissal; and

2.2 The payment of any arrear wages (ifthere were any).

3. In his evidence in-chief, Applicant told this Court that he was an adult Liswati male of Sithobelweni in the Shiselweni District. He further testified that he first started working for the Respondent, as a casual labourer in 2006. From 2008, Applicant moved up to become a heavy duty driver, a position which he occupied up till the elate of his alleged dismissal. Applicant further testified that in 2015, he was involved in a road traffic accident. The said accident occurred whilst he was driving Respondent's truck which was contracted to the then Royal Swaziland Sugar Corporation.

4. Following the involvement of the truck in the road accident, Respondent's Director, Percy Thomas, placed Applicant under indefinite suspension. In

fact, it was Applicant's evidence that the'*Umnumzane'* ordered him never to return to work till he (Applicant) was to be advised by him.

5. And so it was to be that on each occasion Applicant would personally attend at Respondent's premises; stand by the gate (for he was no longer allowed to enter the company premises) whilst awaiting for the Director's guidance and instruction. It was Applicant's testimony that on those dates, i.e. from April 2015 up to January 2016, he never got to meet the Director but his instructions were conveyed to Applicant through his subordinates. As between April 2015, and January 2016, the advice given was to the effect that he was to keep on checking because the truck was not yet back from the panel beaters.

6. Applicant told the Court that things came to a head in January 2016, when his creditors, i.e. First National Bank, started making demands for his un serviced stop-orders. To their demand, Applicant raised the defence that he was no longer earning any salary following his suspension in April 2015. The witness told the Court that the Bank demanded that they be furnished with written proof of the alleged termination of his employment. It was on the above basis, according to Applicant, that he then approached the Director in order to request for the said letter of confirmation of dismissal. For his part, Respondent's Director is said to have flatly refused to write such a letter on the basis that Applicant had actually lied about the real cause of the accident.

7. Upon being given the cold shoulder by Respondent's Director, Applicant then proceeded to the Labour Department to solicit for advice. And it was at the Labour Depmiment that Applicant was advised to approach the Conciliation Mediation and Arbitration Commission (CMAC) and report a

dispute. An attempt at conciliation by CMAC proved futile hence the issuance of the certificate of unresolved dispute.

8. To sum up his evidence in-chief, Applicant told the Court that he received his last pay cheque from the Respondent in April 2015, when he was advised to remain at home to await word about his fate from the Director. Applicant told the Court that he was never charged and/or subjected to any disciplinary hearing. It was Applicant's contention, further that he had never gone on leave (except the December holidays) ever since he joined Respondent in 2006. Fmiher, that he had been under Respondent's continuous employ since the said year. He concluded by asking for the Court to grant him the reliefs as prayed for in his notice of application.

9. Under cross-examination from Mr Maseko, Applicant conceded that the issue of arrear wages (the second claim which was launched by Applicant on the 3 August 2017) was, in fact not part of the issues that were conciliated upon at CMAC. When pushed further, Applicant went on to concede that his dismissal occurred in April 2015, after having been involved in the road accident. Applicant further admitted that at the time of the occurrence of the accident he had a passenger, one Mandia Shongwe, which was contrary to company rules. Then came in the question as to who was driving the truck on the day of the accident, with Mr Maseko insisting that the said Mandia Shongwe was not actually a passenger but the driver of the truck. For this assertion, Mr Maselrn told the Court that evidence in proof of this assertion was to be led from Respondent's witnesses.

I 0.When called upon to respond to the employer's allegation Applicant not only denied same but went on to try and pull 'a confession and avoidance' number here by stating that he had giving Shongwe the lift because he

(Shongwe) was employed as a guard at the fuel depot. This was vehemently refuted by Respondent's Counsel.

11. As to the question of the nature of the parties' contractual relationship since 2006, Mr Maseko asse1ied against Applicant, that the nature of Respondent's operations was project-based and therefore not capable of employing personnel on a permanent basis. To this, Applicant conceded that Respondent was engaged in the construction industry, including that there were times when they were made to sign fixed-term contracts. He, however proceeded to state that this was never consistently adhered to by Respondent.

12. Then Mr Maseko paused the following set of questions to Applicant, which we quote verbatim:

> **Q - Are you aware that the contract for the truck at Mhlume was to come to an end in June 2015?**
>
> **A - I was not aware because I was never told.**
>
> **Q - Were you not aware that the contract between yourself and the Respondent was running from January - June 2015?**
>
> **A- I was not aware because I had not signed such contract.**

13. Under cross-examination by Mr Maseko, Applicant veered off the track and referred to a meeting which was held, on the first clay of his return to work after the accident. At the foyer of Respondent's Reception between Applicant; Respondent's two (2) Directors, *to wit:* Percy and Keith Thomas

as well as one Albert Never Masilela. Referring to the said meeting, Applicant conceded that the three (3) did advise him about the grave consequences of the road accident. Applicant refuted that he was ever told, during the foyer meeting, about the termination of Respondent's agreement by Mhlume; and/or the E21, 188.20, offer that Respondent purportedly made to Applicant towards his terminal benefits.

14. Mr Maseko drew the attention of Applicant to **"Annexure BNl",** being Applicant's Pay Slip, dated the 31st January 2015. We here pause to mention, the displeasure of the Court in the lack of diligence, by Counsel, in ensuring that a proper record was availed for use by the Court. As it turned out, we were made to flip through the volumenous file whilst in an effort to locate some of the documents that were referred to during the course of the trial. For its relevance **"Annexure BNl"** was used by the Applicant in the notice of motion in pursuit of his claim for the alleged arrear wages. Part of the earnings disclosed therein was that of leave pay.

15. Having been shown that he did receive cash in lieu of leave days, Applicant grudgingly admitted this fact. Applicant admitted too, the work stoppage which is common practice within the construction industry during the festive season. He, however denied that same was equivalent to each individual employee's annual leave entitlement.

16. For its case, Respondent paraded only one witness, Albert Never Masilela, who told the Court that he was presently employee\ by the Respondent as the Transport Officer, a position he had been occupying since 2009. This witness went on to confirm Applicant's employment; the involvement of the truck in the accident, including the alleged termination of the service

agreement by Mhlume following the involvement of the fuel tanker in the accident.

17. Mr Masilela testified that the termination of Applicant's services occurred in April 2015, and that it came about because no other job was there for the Applicant. Hence, the E21, 188.20, offer that the company made to Applicant at the foyer meeting.

18. Then as if out of the blue, Mr Masilela went on to tell the Comt about Applicant's breach of company policy, to wit: the offering of lifts to passengers, which *in casu* was coupled with the allegation that at the time of the accident the truck was being driven by an unauthorized person.

19. Regarding Applicant's claim for annual leave, Mr Masilela confirmed that same was duly paid to each of Respondent's employees, in December of each, including the Applicant. Mr Masilela concluded his evidence by asserting that the Respondent's offer of E21, 188.20, was still there for Applicant's taking.

20. ln his cross-examination, Mr Phakathi questioned Mr Masilela about the whereabouts of the documents that Respondent had referred the Court to; i.e. Applicant's six (6) months fixed-term contract of employment as well as; the service agreement with Mhlume. In answer, Mr Masilela told the Court that the documents were in the office and that he had not brought them apparently because no one had advised Respondent about their importance. Mr Phakathi further quizzed Mr Masilela about the status of Applicant in the company prior to his termination in April 2015. The narrative of this part is worthy of note and we therefore quote it in extense:

Q - **Was Applicant driving the fuel tanker from 2008 - 2015?**

A- **No.**

Q - **Meaning that he was not employed specifically for the fuel tanker?**

A- **No, he was not. There was a vacancy for the drive1· and then he was trained and posted there.**

Q - If **he had not been employed specifically to drive the fuel tanker why was he then terminated?**

A - **Because there never was another truck.**

21. As regards the question of Applicant's visits to Respondent's premises, Mr Masilela denied that there ever was any such, insisting that Applicant's last visit to Respondent's premises was on the day of the foyer meeting. Asked as to why did the company not charge Applicant for the damage of company property, Mr Masilela told the Court that Respondent opted for a retrenchment. Then to the utter shock of the Court, Mr Maseko then closed Respondent's case.

22. In making his closing submissions, Mr Phakathi re-iterated that Applicant's case was two-pronged, viz:

22.1 The application for arrear wages; and

22.2 The application for unfair dismissal.

In his submissions, Mr Pbakathi was alive to the fact that Respondent's liability to pay the so-called arrear wages was dependent on the question as to when and how the termination of Applicant's services was communicated to him. For his part, Applicant asserted that the termination of bis services

took place some ten (10) months later, i.e. February 2016, when the *'Umnumzane'* told him to stop 'reporting' at Respondent's business premises.

23. It was Mr Phakathi's contention that Respondent's delay in communicating Applicant's termination actually meant that Applicant continued to be an employee of Respondent with the concomitant right to timeously receive his monthly remuneration.

24. As towards the claim for unfair dismissal, Mr Phakathi re-iterated Applicant's assertions to the effect that the dismissal was both substantively and procedurally unfair. The dismissal was said to be substantively unfair because the factual basis relied upon by Respondent for dismissing Applicant were not those that are covered under **Section 36 of the Employment Act, 1980.** The attack regarding the procedural aspect of Respondent's actions was premised upon the allegation that Applicant was never subjected to any disciplinary process for the road accident. As for Respondent's assertion to the effect that Applicant was never dismissed but rather retrenched for operational reasons, Mr Phakathi urged the Court to regard same as nothing but an after-thought.

25. In articulating his client's case, Mr Maseko submitted that the dismissal of Applicant was for a fair reason, *to wit:* operational requirements, in that the damage that was occasioned to the fuel tanker left Applicant without a tool of trade. Mr Maseko emphasized that the involvement of the foe! tanker in the road accident brought with it dire consequences for Respondent, i.e. the cancellation of Respondent's contract with Mhlume. Respondent contended that this occmred because Respondent could not provide a replacement for the damaged truck which led to the premature termination of the contract.

The logical consequences of the aforegoing was to render Applicant to be redundant.

26. To the above defence, Mr Maseko further argued that Applicant was not an employee to whom Section 35 applied. Herein, it was Respondent's assertion, that Respondent was engaged in the construction industry. It was contended that all of Respondent's employees were therefore engaged on fixed-term contracts, the longest being twelve (12) months. Indeed, it cannot be denied that the nett result of the aforegoing, it correct, would be to render Applicant as being not eligible for protection under **Section 35 of the Act.**

27. As to the question of annual leave due, Mr Maseko refoted Respondent's liability for same and proceeded to suggest, without referring us to any authority, that workers that are engaged in the construction industry enjoy their annual leave during the Christmas holidays. Counsel proceeded further to bemoan Applicant's failure to properly set-out, in its founding papers, a fully particularized basis for the mmual leave claim. The encl result of which was said to be the contention to the effect that same was not sustainable at law.

28.0ne aspect of the case is capable of quick disposal, *to wit:* the claim for arrear wages. This claim is clearly not sustainable for the simple reason that same was never ac\judicated upon before CMAC. It is now trite that this Court does not take cognizance of disputes of fact that have not been dealt with under Part VIII of the Act. The certificate of unresolved dispute **"Annexure AGl",** does not show arrear wages as being amongst the list of items that were reported and subsequently conciliated upon. The result is that, Applicant's claim for the arrear wages must therefore fail.

29. The next enquiry towards the resolution of this puzzle is to try and answer the question as to whether Applicant was an employee to whom the provisions of **Section 35** applied. For its part, **Section. 35** denies its application to a certain list persons, one of whom is *"an employee engaged for a fixed term contract and whose term of engagement has expired"*. Even as the facts of the case where being traversed, this Court was at pains to grasp the relevance of this sub-section to Respondent's defence. This was so, mainly because of two (2) reasons; firstly, because Respondent had failed to furnish the Court with such documentary evidence as was there to prove that at the time of his dismissal, Applicant was employed on a fixed-term contract, one which had run its duration.

30. lnstead, Mr Masilela on cross-examination by Mr Phakathi rather casually claimed that such documentary evidence had been left in the office apparently because 'no one had advised him to bring it'. This was a very astonishing statement because, *in casu,* it was the employer who was saddled with the duty of proving that the entire duration of Applicant's employment was through the use of fixed-term contracts. And in the absence of such proof, the Court is duty-bound to give effect to the provisions of **Part IV of the Employment Act 1980,** especially **Section 22 and 32** thereof, and hold that Applicant had been employed on a permanent basis since February 2006.

31. The second difficulty that this Court had was directly linked to the Respondent's version of events. It was Mr Masilela's testimony that Applicant's purported last fixed-term contract was for six (6) months, i.e. January 2016, 30 June 2016. The difficulty of this Court stemmed from the fact that even if it were to be held that Applicant was employed on a six (6) months fixed-term contract, an argument which we have already rejected,

such contract had not yet run its course when he was dismissed in April 2015. This fact alone renders Applicant to be an employee to whom the provisions of **Section 35** applied.

32. The Employment Act does allow an employer to terminate the services of employee on account of certain circumscribed reasons which are spelt out within the Act. **Section 2 of the Employment Act, 1980,** defines "redundant employee" to mean an employee whose contract of employment has been terminated-

> *"(c) because of any of the following reasons connected with the operation of the business-*
>
> *(i) modernization, mechanization, or any other change in the method of production which reduces the number of employees necesSWJI,'*
>
> *(ii) the closure of any part or department of the business;*
>
> *(iii) marketing orjinancial dijjiculties;*
>
> *(iv) alteration in products or production methods necessitating different skills on the part of employees;*
>
> *(,y lack of orders or shortage of materials,·*
>
> *(vi) scarci(p of means of production,·*

(vii) *contraction in the volume of business".*

33. Regrettably, neither during the presentation of oral evidence nor during closing arguments was Respondent able to assist us to place our fingers on the exact operational reason(s) which compelled it to retrench Applicant. For this one, Respondent literally left us to our devices regarding the question as to Respondent's compliance with both the substantive as well as the procedural aspects of the retrenchment. **Section 40 of the Employment Act** states very clearly that where an employer **contemplates terminating the services of an employee for reasons of redundancy, then he shall give notice.** And the onus is upon the employer to establish, firstly, that there was a substantive need for the retrenchment and, secondly, that the **Section 40** procedural requirements were adhered to.

34. The Court has carefully considered Counsel's arguments as to whether Applicant's termination was a retrenchment as envisaged by **Section 40** and has arrived at the following conclusion:

34.1 That, there was not even a scintilla of evidence to show that Respondent was aware,when it terminated Applicant's services in April 2015, of the obligations bestowed upon it by **Section 40 of the Employment Act.** Instead, what we were shown, by Mr Masilela in a rather very disdainful manner, was the 'offer' of E21, 188.20, which Respondent's Directors purportedly made to Applicant during their meeting at the foyer. It was readily discernible, both from Mr Masilela as well as from Respondent's Counsel that the E21, 188.20 was offered not as a legal entitlement but rather as a 'token payment'. The reference to the loss occasioned to the

Respondent as a result of the damage to its truck at the hands of Applicant bears witness to the above conclusion.

34.2 Then there is this legal predicament that runs right upon the face of Respondent's assertion that the retrenchment was due to operational requirements, i.e. proof that Respondent actually consulted Applicant prior to the dismissal. Like all dismissals, retrenchments are supposed to be both procedurally and substantively fair. **See John Grogan Workplace Law 10th Ed at 273 - 274. Also Lonhlanhla masuku v K.K. Investments (Pty) LTD. IC Case No. 341/03; Phyllis Phumzile Ntshalintshali v SEDCO IC Case No. 88/2004 especial paragraph 27 thereof.**

35. And in the light of the aforegoing conclusions, we therefore hold that Applicant's services were unfairly terminated in April 2015. We further hold that Respondent failed to bring to Court any documentation to prove, firstly, that Applicant was employed on a six (6) months fixed-term contract, and, secondly, the purported letter of termination of the foel-haulage contract by Mhlume. That Respondent's case was dependent upon these two (2) documents is common cause.

36. In the premise, the Court concludes that the termination of Applicant's services was both substantively and procedurally unfair. For relief, Applicant does not seek reinstatement to his former employment with Respondent, but he is claiming compensation for his unfair dismissal. And having taking into account Applicant's age and present circumstances; his service record with Respondent; the high handed manner in which Respondent's Directors treated Applicant, including the period of nine (9) months wherein Applicant

was kept in limbo and without pay, the Court is of the view that ten (10) months compensation constitutes a fair and reasonable compensation.

37. Judgement is therefore entered m favour of the Applicant against the Respondent as follows:

38.1 Notice pay	**E 4,250.00.**
38.2 Additional pay	**E 5,216.00.**
38.3 Severance Allowance	**E13, 040.00.**
38.4 Ten (10) months Compensation for unfair dismissal	**E42, 250.00.**
Total	**E64,756.00**

There shall be no order as to costs.

The Members Agree.

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicants : Mr Phakathi ofMH Mdluli Attorneys.

For Respondents : Mr Maseko of Waring Attorneys.