IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 43/2019

In the matter between:-

SKHUMBUZO GAMEDZE & 21 OTHERS APPLICANTS

And

PREMIER SWAZI (PTY) LTD RESPONDENT

Neutral citation: Sikhumbuzo Gamedze and 21 others v Premier Swazi (Pty) Ltd (43/2019) [2021] SZIC 80 (25 October 2021)

Coram: **THWALA - JUDGE**
(Sitting with Ms N. Dlamini and Mr. S. Mvubu, Nominated Members of the Comi)

Heard: 19 July 2021.

Delivered: 25 October 2021

JUDGEMENT

Introduction

1. As can be seen from the date of hearing above, this matter was argued on the 19 th July 2021, after which judgement was reserved. Even though the delay in the delivery of the judgement was due to circumstances that were beyond the control of the Court, same is however, regrettable because the promptness in the delivery of judgements is a cornerstone of judicial discipline as well as to the rule of law.

Background Facts

2. On the 14th March 2019, Sikhumbuzo Gamedze together with the Twenty -one (21) other Applicants' approached this Corni on motion, seeking for the following reliefs:

2.1 Ordering and directing the Respondent to correct the engagement date of the Applicants to 2016;

2.2 Declaring the disparate remuneration of the Applicants from their colleagues who are doing one and the same job as unfair labour practice;

2.3 Ordering and directing the Respondent to pay Applicants the sum ofE387, 587.20, being short payment or/shmifall arising from the disparate remuneration treatment of Applicants between May 2016 and January 2018;

2.4 Costs of this application to be awarded against the Respondent; and

2.5 Granting the Applicants further and/or alternative relief as the comi may deem fit.

3. Respondent swiftly moved in to oppose the granting of the reliefs sought by filing its answering affidavit which was deposed to by its Human Resources (HR) Manager, one Bridgette Magongo, where after Applicants filed their replying affidavits in which they joined issue with Respondent.

4. About five (5) months after the closure of pleadings in the matter, Applicants then filed a voluminous supplementary affidavit in which each of the twenty-two (22) applicants was made to reiterate their complaints against the Respondent. Respondent proceeded to file its "Responses" to Applicants' supplementary affidavit in which it too reiterated its position towards the relief being sought by the Applicants.

Applicants' case

5. The numb of Applicants' case is the following:

5.1 That, on the O1st May 2016, Respondent recruited Skhumbuzo Gamedze and the twenty- one (21) other Applicants' as labourers within its bakery as within the bakery department. It would appear that the purpose for Applicants' recruitment was to optimize Respondent's production by the introduction of a three (3) shift system for its production line. Applicants' were brought in to enable Respondent to arrange the Bakery department's work load between Applicants' and Respondent's employees who were already permanently employed in the Bakery department, (the comparators).

5.2 That, at the time of their recruitment in May 2016, Respondent remunerated Applicants at a rate ofE8.00 per hour, a figure that was then revised upwards in July 2017, to E 8.48 per hour.

5.3 That, sometime before November 2017, (the specific that is not stated in the papers) Applicants got wind of the fact that a colleague of theirs who was employed on the 03rd October 2016, had been employed on permanent basis and fu1iher placed at the same pay rate as Applicants' comparators. It was Applicants' fu1iher submission that they took up the issue with Respondent, who responded by not denying the pay disparity but by proffering an affirmative defence, to the effect that Applicants were ***"casuals".***

5.4 That, in November 2017, Respondent was forced to undergo some cost cutting measures which resulted in the retrenclm1ent of its workforce including Applicants.

5.5 That, it was during the course of the engagement on the retrenchment

process that Applicants' discovered that there existed a differentiation in pay at the

Bake1y department in that Applicants were being remunerated at a lower rate than their comparators. Specifically, it is averred by the Applicants that in May 2016, their comparators were being remunerated at El2-68 per hour, a figure that was revised in July 2017, to El3-68 per hour. It is in the said consultations for the retrenchment process that Applicants' status took yet another twist viz: that of being declared as permanent employees as per company policy.

5.6 Then followed a spell of silence of almost a year before Applicants took up the issue of pay disparity with the Respondent. This Applicants did by writing a letter dated the 31st October 2018, in which they demanded that Respondent must correct the pay disparity as well as their date of engagement. It appears from the papers that Respondent did indeed attend to the correction of Applicants' date of engagement. And ***"Annexure A"*** of Respondent's founding affidavit (at page 22 of the Book of Pleadings), being a letter dated the 16 th November 20 I 8, bears witness to this fact. Notwithstanding Respondent's aforesaid act and on the 26th November 2018, Applicants' still proceeded to the Conciliation Mediation and Arbitration Commission (CMAC), where they allegedly reported a dispute. It is regrettable that Applicants' pleadings do not contain the said CMAC report of dispute. It is common cause that the inclusion of this document in Respondent's pleadings would have given the Court a better glimpse of the issues that were repo1ted to be under dispute between the paities at CMAC.

6. So it was that Applicants' closed their case with a categorical statement in which they stated their claim to be that of pay discrimination for which they

prayed for correction and recompense.

Respondent's Case

7. For its case, Respondent filed its answering affidavit tlu·ough Brigette Magongo, its Human Resources Manager, who in a rather very brief mam1er.-

7.1 Confirmed the letter of the 16th November 2018, in which Respondent backdated Applicants' contracts of engagement to the 01st May 2016. Here we note that Respondent's letter of the 16 th November 2018, came at the same period as the implementation of the process of retrenchment. The correct placement of this letter helps one in having a good understanding of the **HR** Manager's assertion to the effect that the backdating was ***"only to assist the applicants in long service recognition".***

7.2 Respondent averred further, that the relief that was being sought by Applicants' was one for the creation of fresh rights for higher wages, for which this Court had no jurisdiction to entertain.

Issues for determination

8. Notwithstanding Mr Jele's spirited argument to the effect that the determination of this matter was premised upon disputes of rights and disputes of interests,

we consider the determination of this matter to be premised, firstly, on the status of employment of the Applicants as at the date of announcement of the retrenchment by the Respondent, i.e. November 2017. Secondly, on the question

as to whether Applicants were able in their papers to discharge the *onus* placed

upon them by our law of proving, on a balance of probabilities, that Respondent's pay disparity amounted to pay discrimination against them. We proceed to consider each of these issues *ad seriatim.*

Ad Applicants' status of employment

9. The status of Applicants' within Respondent's establishment is borne out by Mr Jele at Paragraph 6 of his Heads of Argument which we proceed to quote in its entirety:

> **"However, there is a huge hurdle that the Applicants' face- this hurdle is the terms and conditions of employment which has not been presented before this Honourable Court.** It **is the allegation by the Respondent, in response to the Applicants' contentions, that the differences in employment are caused, largely by the fact that these employees were employed on different terms and conditions. The Respondent's case is that the Applicants were employed under different terms in that they were temporary employees whilst the others were permanent employees.** It **is the Respondent's case that the two groups of employees had different salaries due to that".** Underlining is ours.

10. Respondent's classification of Applicants' status of employment as that of temporary employees has no support under our law. The factual matrix is clear, *to wit;* that Applicants were engaged by Respondent in May 2016 up till their date of retrenchment in November 2017, a non-stop period of some 18 months in total. In the case of **Sibusiso Mkhonta and Others v Swaziland**

Government

IC case No.256/2005, this Comi rejected the Government's argument to the effect that the then Civil Service Board had the right to:

> **"classify employees such as the Applicants as "temporary", notwithstanding that they may have been in the continuous service of the Government for a substantial period of time"** at paragraph 16.

Indeed, in the above- captioned judgement, the learned Judge President proceeds to cite with approval, the case of **Vusumuzi Shongwe v The Principal Secretary Ministry of Works and Transport and Others IC Case No. 216/2000,** where the couti emphatically stated that there was nothing ***"temporary"*** about an employee who had served the Government for a period of twenty-eight (28) years, simply because of the categorization by his employer.

I I.It is on the basis of the above legal authorities that we hold that in terms of **Section 32(2) of the Employment Act,** and upon the expiry of the three (3) months probationary period, i.e. 01'[1] August 2016, Applicants' status of employment conve1ied, *ipso iure* to permanent employees and therefore liable to protection against the unfair termination of their services.

Ad Pay discrhnination

12. Pay discrimination occurs when employees who are performing similar work do not receive siniilar remuneration. In *casu,* Applicants' contention was that their employment in May 2016, was so as to facilitate for the addition ofa third shift.

This asse1iion was not placed under any contention by the Respondent and is therefore liable to acceptance. Nor did we hear Mr Jele to be denying Applicants' averments to the effect that they **were employed as labourers** in Respondent's Bakery depatiment. Instead, Respondent appeared to have taken comfoti in its contention to the effect that Applicants' status was that of ***"temporary employees".***

13. Whilst we are alive to the fact that we have already made our ruling regai'ding Applicants' employment status within Respondent's establishment, we however wish to go fmiher and reject this idea that an employer has a right to remunerate an employee with lower wages simply on the basis that they are classified as temporary employees. The principle of ***"equal pay for work of equal value"*** has very little to do with the categorization of employees by their employer, but rather with the effo1i, skill and decision making that the two sets of employees are called upon to exert in the course of their employment.

14. Regarding the aforegoing principles Landman **J,** said in the case of **Michael Louw v Golden Arron Bus Service (Pty) LTD [19991 ZALC 166 (23 November 1999):**

> **"They are principles of justice, equality and logic which may be taken into account in considering whether an unfair labour practice has been committed, e.g. the payment of unequal pay for equal work or work of equal value in the context of unfair discrimination. In other words it is not an unfair labour practice to pay different wages for equal work or work of equal value.** It **is however an unfair labour**

practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination or arbitrary grounds or the listed grounds e.g. race or ethnic origin." Paragraph 23.

15. From the pleadings as filed by the parties as well as the arguments that were advanced during the hearing before us, this Court is more than satisfied that Applicants were able to discharge the burden of proving that Respondent did employ them to man its third shift. Further, that their engagement entailed the execution of work ofa similar nature as the other two shifts which were manned by their comparators. This appears to be the most reasonable conclusion in the circumstances of this case.

16. In the result, the Court makes the following order:

16.1 The Respondent is ordered to calculate and make good the pay disparity that Applicants were made to suffer from their date of engagement upto their date of retrenchment.

16.2 Respondent is further directed to recalculate Applicants' terminal benefits so as to conform with the pay scale provided for in Prayer l above.

16.3 There shall be no order to costs.

The Members Agree.

M.M.THWALA

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicants	Mr A. Fakudze
For Respondents	MrD. Jele