



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No.216/2021

In the matter between:

THAMSANQA ZIYANE

Applicant

And

A.J. ELECTRICAL (PTY) LTD

Respondent

Neutral Citation: Thamsanqa Ziyane vs. A.J. Electrical (Pty) Ltd (216/2021)
[2021] SZIC 111 (05 January, 2022)

Coram: **MSIMANGO-ACTING JUDGE**
(Sitting with Mr. S. Mvubu and Ms. N. Dlamini - Nominated
Members of the Court)

DATE HEARD: 12th November, 2021

DATE DELIVERED: 05th January, 2022

*SUMMARY: The Applicant alleges that his services were unfairly terminated by the Respondent in that he was not dismissed for misconduct, and that his dismissal was not preceded by a disciplinary hearing. Further that, he was an employee to whom **Section 35(2) of the Employment Act (as Amended)** applied. Hence, his dismissal could only be for a reason provided in **Section 36 of the Act**.*

JUDGEMENT

- [1] The Applicant is Thamsanqa Ziyane, an adult male of Bhunya, in the Manzini Region.
- [2] The Respondent is A. J. Electrical (Proprietary) Limited, a company registered and incorporated in terms of the company laws of the Kingdom of Eswatini, having its principal place of business at corner of 3rd Street and Tabankulu Streets, Matsapha Industrial Site in the Manzini Region.
- [3] The Applicant has brought an application before this Honorable Court for determination of an unresolved dispute.
- [4] The application was duly served on the Respondent on the 3rd July 2021, and was set down for hearing on the 16th August 2021. The Respondent filed and served a Notice of intention to oppose, but did not file any Reply to the application.
- [5] On the 28th October 2021, Applicant filed an application as per **Rule 19 of the Rules of this Court**, praying that the matter proceeds as an *ex parte* trial, the Respondent having failed to deliver a Reply within the extended period granted by the Court. The application was duly served on Respondent's Attorneys and it was not opposed, as a result the matter proceeded *ex parte*.
- [6] The Applicant testified that he was employed by the Respondent as an electrician on the 16th April 2018 until 12th April 2021, when his services were terminated. He stated that his employment was based on three (3) months fixed term contracts. The contracts were renewed after every three

(3) months.

- [7] The Applicant also testified that he worked continuously without interruption from the date of his employment up to its termination. Furthermore, he was informed in writing by the Respondent just after he had finished work on the 12th April 2021 that his services would be terminated. He clarified that the employer had never informed him prior that his services would be terminated as a result of lack of projects.
- [8] It was Applicant's testimony that when his services were terminated, he was earning a monthly salary of not less than E2, 500.00 (Two Thousand Five Hundred Emalangi). He explained that his salary was based on an hourly rate of E13.85 (Thirteen Emalangi Eighty Five Cents) and that at times he worked overtime.
- [9] The Applicant argued that he was an employee to whom **Section 35(2) of the Employment Act of 1980** (as amended) applied. Hence, his dismissal could only be for a reason provided for in **Section 36 of the Act**. Further that, termination on the account of operational requirements is regulated by **Section 40 of the Employment Act**. The mere fact that Applicant was not notified of the impending retrenchment against him and that he was not consulted prior to the termination of his services, such conduct is against the dictates of **Section 40 of the Act**.
- [10] In the circumstances the Applicant asserts that his dismissal was procedurally and substantively unfair, and claims payment as follows:-
- (a) Notice pay in the sum of E2, 905.73.
 - (b) Additional Notice pay in the sum of E1, 072.00.
 - (c) Severance pay in the sum of E2, 641.00.
 - (d) 12 months compensation in the sum of E34,868.76.
- [11] **Section 40 of the Employment Act** provides as follows:-

- (1) For the purposes of this Section the term "employee" shall be deemed not to include any employee.**
 - (a) engaged on seasonal contract,**
 - (b) engaged on a fixed contract of six weeks or less and which does not provide for re- engagement at the end of that period,**
 - (c) who is a casual employee.**

- (2) Where an employer contemplates terminating the contracts of the 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 the organisation (if any) with which he is a party to a collective agreement and such notice shall include the following information:-**
 - (a) the number of employees likely to become redundant,**
 - (b) the occupations and remuneration of the employees affected ,**
 - (c) the reasons for the redundancies, and**
 - (d) the date when the redundancies are likely to take effect,**
 - (e) the latest financial statements and audited accounts for the undertaking,**
 - (f) what other options have been looked into to avert or minimize the redundancy.**

[12] It is significant to point out that a termination on the account of operational requirements is regulated by **Section 40 of the Employment Act**. The mere fact that Applicant was not notified of the impending retrenchment against him and that he was not consulted prior to the termination of his services, such conduct is against the dictates of

Section 40 of the Act.

[13] Although Applicant was employed on a three (3) months fixed term contract which was perpetually renewed for three (3) years. In the case of **Nombulelo Matsebula and Another v Standard Bank Swaziland, Industrial Court Case No. 275/2000**, the Court had this to say:-

*"It is very clear that the monthly contracts were aimed at circumventing the provisions of the Employment Act, by keeping the recruits on trial for about sixteen (16) months continuously and at the same time deny them the protection to become employees to whom **Section 35 of the Employment Act** applied This way, the Respondent was able to keep them under probation for more than six (6) months and by so doing circumvented the provisions of the Act"*

[14] In the case of **Bernard Hough v U.S.A Distillers (Pty) Ltd 20/11 SZIC**, the Court stated that:-

"The law requires that for a retrenchment to be valid it must be substantially fair and just towards the employees effected This means that a valid bona fide and fair reason must exist for the termination of the employee's services on account of operational reasonsthe employer is entitled to take the preliminary decision to retrench its employees on its own, however, the employer may not finalise that decision before consulting with the employee(s) involved... "

[15] The Court stated further that:-

"Employees to be retrenched need to be afforded a fair opportunity to make meaningful proposal to the decision to terminate them, and implicit in the requirement of a fair opportunity is the duty to give them reasonable notice of the same. Such notice must allow them time and space to absorb the shock brought about by the daunting prospect of losing their Jobs. Retrenchment employees must be afforded the opportunity to come to terms

with the situation, reflect on it, seek advice and prepare for consultation and only then can a/air process and genuine consultation begin ...The duty to engage in a meaningful and genuine consultation process is owed to all employees from the lowest to the executive level."

[16] Taking into account the evidence and circumstances of the case together with the failure by the Respondent to refute Applicant's evidence, the Court accordingly makes the following order:

(a) The termination of the Applicant's services by the Respondent was both procedurally and substantially unfair.

(b) The Respondent is hereby ordered to pay the Applicant as follows:-

(i) Notice pay(less 10 days paid) E1, 728.48

(ii) Additional Notice pay (4 days for each year worked) E941.80

(iii) Severance pay (10 days for each completed year) E2, 354.60

(iv) 8 Months compensation (for unfair dismissal) E23, 245.84

Total **E28 270.72**

(c) There is no order as to costs.

[17] The payment aforementioned is to be made within thirty (30) days hereof.

The Members agree.

L.MSIMANGO

ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant:

Mr.M.Motsa

(Musa Motsa Attorneys)

For

Respondent:

No Appearance