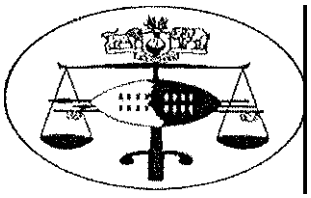

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 53/2018

In the matter between:-

PRUDENCE KUNENE APPLICANT

And

THE SWAZILAND CONFERENCE OF CHURCHES RESPONDENT

Neutral citation: Prudence Kunene v The Swaziland Conference of Churches (53/2018) [2022] SZIC 37 (13 April 2022)

Coram: **THWALA - JUDGE**

(Sitting with Mr M. Mtetwa and Mr A.M. Nkambule,

Nominated Members of the Comi)

Heard: 21st OCTOBER 2021 .

Delivered: 13 APRIL 2022

JUDGEMENT

Introduction

[l] The present proceedings were instituted by the Applicant against the Respondent on the 19th February 2018. In her application for the determination of the unresolved dispute, Applicant alleged the following:-

That, she was employed by the Respondent as an Information Officer on a two year fixed- term contract commencing on the 1st July 2009, and ending in September 2011.

That, despite the expiration of this two (2) year fixed term contract, Applicant continued to perform her duties, this time on a three (3) year fixed- term contract which was to expire in September 2014. A written agreement, *"Annexure PK 2"*, was attached to Applicant's papers as proof of the paiiie's second agreement.

Applicant further alleged that when the second fixed- term contract expired in September 2014, the parties then entered into yet another fixed- term contract which consisted of different terms from the two (2) previous ones, notably; that Applicant was now engaged as a Marketing Manager instead oflnformation Officer. The new post also came with an improvement in Applicant's pay package from E3500.00 per month to E8500.00 per month.

1,4 That, this last fixed-term contract was orally terminated prior to its due date by Respondent's Human Resources Manager, one Nkabinde Shabalala on the 9th October 2017, due to Respondent's financial constraints.

1.5 That, Respondent's above actions amounted to an unlawful retrenchment, it having been effected without prior consultation with the Applicant as per the dictates of **The Employment Act, 1980.**

1.6 That, as a result of this alleged substantive and procedural breach, Applicant was now claiming for the following reliefs:

a) Notice pay	E8500.00;
b) Additional Notice	E 636.36;
c) Leave days Due (20)	E7, 727.27;
d) Remainder of contract (16 months)	El 36, 000.00;
e) Gratuity	E28, 284.00; and
f) Unfair Dismissal	E 102,000.00
TOTAL	E283, 147.72

[2] For its part, the Respondent has filed its replies which are noticeably argumentative and riddled with rhetoric. Whilst insisting that the dismissal was both procedurally and substantively fair, Respondent goes beyond the basic rules of pleadings, as developed long ago and have stood the taste of time, which demands that a Defendant/Respondent must plead only those facts that are necessary for its defence. Pleadings are not, and they should never be converted

to opening submissions and/ or arguments. Regrettably, this is what the Respondent has done in this matter!. Rule 8 of the rules of the Court states:

> **Rule 8 (2): The reply shall be signed by or on behalf of the Respondent and shall contain-**
>
> **a).....;**
>
> b).....;
>
> **c).....;**
>
> **d) <u>a clear and concise statement of the material facts and legal issues upon which the Respondent relies in its defence.</u>**

[3] In the **<u>Harmse v City of Cape Town,</u> Waglay J** (as he then was) said the following conceming a similarly worded rule, i.e. **Rule 6 of the South African Labour Court Rules:**

> **8 The Rules of this Court do not require an elaborate exposition of all the facts in their full and complex detail- that ordinarily is the role of evidence, whether oral or documentary. There is a clear distinction between the rnle played by evidence and that played by pleadings- the pleadings simply give the architecture. The detail and texture of the factual dispute are provided at the trial. <u>The pre- trial conference provides an occasion for the detail or texture of the factual dispute to begin to take shape.</u>'**

[1] Harmes v City of Cape Town [2003] 6 BLLR 557 (LC). Also Liquid Telecommunications (Pty)Ltd v Valerie Carmichael-Brown [2018] 8 BLLR 804 LC

[4] From the above cited authorities, it is clear that the rule enjoin a party to plead only material facts, meaning those facts that are necessary for the purpose of formulating a cause of action and/ or defence, not background facts or evidence. Still less should they contain arguments, reasons and/ or rhetoric.

[5] Ms Prudence Kunene testified in supp01i of her claim wherein she gave a narrative of the events as per the pleadings above. Salient features of Applicant's evidence in- chief included the fact that:

5.1 Applicant served Respondent as its employee for a period of eight (8) years, i.e July 2009 up to October 2017;

5.2 Within this eight (8) year period, the partie's contractual relationship got to be varied in four (4) instances, the last of which saw Applicant being elevated to the managerial position of Marketing and Information Manager. This is the position that she held at the time of the termination of her employment.

5.3 Applicant received no terminal benefits in consequence of the termination of her services for each of the four (4) fixed- term contracts. The relevance and/ or legal significance of this piece of Applicant's evidence was not immediately clear to the Court, especially because it had not been formulated as pmi of her claim against Respondent in the repo1i of dispute before the Conciliation Mediation and Arbitration Commission (CMAC). The Certificate of Umesolved Dispute (Annexure PK 4) also bears testimony to the above assertion of the CoUli, because it concerns itself with Applicant's claims as based upon her last contract. It is because of the above facts therefore, that this Court shall confine itself to the claims

as contained in Atmexure PK 4. It will be in that context also that Applicant's evidence will be analysed.

[6] Indeed, we record that the above stance represents the position of the Court notwithstanding Applicant's attempts to sway the Court otherwise. Applicant's belated claims were rejected by the Court simply on the basis that same represented a material deviation from the issues as repo1ied by Applicant, for conciliation before CMAC. Annexure **PK** 4 bears witness to this that it was Applicant, out of her own free will and volition, who opted to use Respondent's computations for Severance Allowance; Additional Notice as well as Gratuity.

[7] It was Respondent's evidence before this Cami that the termination of Applicant's employment was a retrenclunent due to operational reasons.

Section 40 of the Employment Act, 1980, places an onus, upon the Respondent to show, firstly, that there was a substantive reason for the retrenchment and of course the need for redundancy/ retrenchment may arise from *"marketing or financial difficulties"-See* **Section 2** (on the definition of *"redundancy")* in the Act. Respondent further bears the onus to prove that it had also complied with the **Section 40** procedural requirements. And lastly, that the decision to retrench Applicant was reasonable and fair under the circumstances- see **Section 42 of The Employment Act.**

[8] In her evidence before us, Applicant appeared not to refute Respondent's dire financial situation. In fact, it was her evidence, which was not refuted by any of Respondent's witnesses that Respondent's dire financial situation had been like that even in 2009, when Applicant joined the organization. The question that begs the answer by the Court therefore is; that of timing. In other words, we are being called upon to place under scrutiny, those special facts and/ or

circumstances, if there be any, which forced Respondent to declare Applicant's position as redundant on the 9th October 2017.

[9] From the evidence as adduced by both parties before us, there appeared to be no doubt that Respondent was in a dire financial predicament. Indeed, even Applicant concurred with Respondent's witnesses that the organization was dependent on its member- church donations for its survival. It is on this basis that we are prepared to hold that the Respondent has demonstrated the existence of a substantive reason for the retrenchment of Applicant. In other words, the Court is prepared to uphold and confirm Respondent's prerogative to take the decision at anytime, of trying to ave1i its dire financial situation.

[I OJ However, the same cannot be said regarding compliance with the procedural aspect of the Act, i.e. the giving of due notice to each individual employee who, at the time, stood to be affected by the retrenchment. In its conespondence dated the 2nd October 2017, which was handed in as pati of Applicant's bundle of documents, Respondent communicates the instant termination of Applicant's contract of employment clue to the organisation's financial predicament. In its case before us, both Mr Mhlanga and Respondent's witnesses tried very hard to persuade us to hold that no notice was necessary for the Applicant because, as a senior manager, she was actually privy to the financial status of the Respondent. We fo1ihrightly reject this argument. In a retrenchment process, due notification of the intention to embark upon a retrenchment process is a stand-alone legal requirement, not a mere formality. In fact, it marks the commencement of a *"new procedural process",* which bas its own processes and procedures. An employer is obliged by law to make sure that eve1y requirement that is set, by the Act, is properly satisfied. Sadly, in the circumstances of this case, Respondent failed to even satisfy the very first, i.e. formally communicate with Applicant regarding

[2]her eminent retrenchment. This therefore renders the Applicant's termination to be unfair by reason of non- compliance with the procedural aspects of **Section 40 of the Employment Act, 1980.**

[11] Regarding Respondent's attempt to show that a fair procedure was followed by the employer whilst in the cause of Applicant's retrenchment, all of Respondent's three (3) witnesses answered this query in the affirmative. They all insisted that Respondent observed a fair procedure in going about the retrenchment of Applicant's position. In its previous judgements, this Court has held that notice of the employer's intention to retrench must be given to the employee(s) union (where there is one) or communicated directly to the employee (s) who stands to be affected. Herein, it is clear that a group announcement cannot be used as a substitute for individual notices. By this expression, we must not be understood to be negating the use of collective briefings of employees, especially where there exists no collective bargaining organization. However, those briefings must still be used together with written notices and/or letters drawn to the attention of each individual employee.

[12] Indeed, in her evidence before the Court, Applicant placed Respondent on the spot when she told the Comi that Respondent's precarious financial situation was not a new thing. **In** fact, Applicant narrated to the Comi that there had been instances, in the past, where they, as employees, had gone without pay, all in the hope that Respondent's financial situation would improve one day. In the case of **Bernard Hough v U.S.A Distillers *(Pty)* Ltd**[2] , this Comi there held that:

> ***"The Court points out that this duty to engage in a meaningful and genuine consultation process is owed to all employees from***

[2] (29/2011)12014] SZIC 29 (15 JULY 2014)

the lowest to the executive level, and that the final decision to retrench much be i, formed by what transpired during the consultation." At paragraph 66.

In the same judgement, His Lordship Dlamini **J,** held that employees that are earmarked for retrenchment must be afforded sufficient time to come to terms with the possibility oflosing their job; to reflect on such prospect; seek for advice and then prepare themselves for consultation. The aforegoing narrative demonstrates one thing, viz: that notice and consultation cannot occur in one day.

[13] In the case before us, it is common cause that no written notice, of the intended retrenchment, was ever served, by the Respondent, to the Applicant. The resultant failure to do so, on the pati of the Respondent rendered Applicant's dismissal process to be procedurally tmfair.

[14] Applicant's pleadings as filed of record revealed two (2) distinct causes of action, firstly, unfair dismissal as per our statutory laws and, secondly, arising at common law between an employer and an employee. Applicant's claims, as based upon the Employment Act were:

13.1 Notice Pay;

13.2 Additional Notice pay;

13.3 Leave pay; and

13.4 Compensation for unfair dismissal

[15] Under the rubric of our common law, Applicant prayed for:

[3]14.1 Payment for contractual damages in respect of the remainder of the contract (16 months); and

14.2 A Pro rata share of her gratuity.

[16] There is now no doubt that this Comi is, by law, clothed with the necessary jurisdiction to enquire into and make a determination of both of these claims, subject to the condition that proper and adequate evidence has been adduced. Fu1ihermore, the CMAC Ce1iificate of Unresolved Dispute reflects that Applicant did place her conm1on law claims for conciliation. Indeed, part of the facts that were common cause between the paiiies was the sixteen **(16)** months which remained outstanding as at the time of the termination of Applicant's contract. The question for determination therefore is whether Applicant is entitled to payment for contractual damages for this period.

[17] Under our common law, there does exist a claim for breach of contract, in favour of the innocent paiiy, against the patiy that is in default. In order for Applicant to succeed on her sixteen (16) months contractual damages claim, she must show, firstly, that a contract existed; secondly, that the contract was breached and/ or unlawfully terminated by the Respondent; and lastly that Applicant suffered loss (damages) as a result of the Respondent's breach. In the case of **Myers v Abrahamson** [3] ,the Comi there said:

> ***"The measure of damages accorded such employee* is, *both in our law and in the English law, the actual loss suffered by him represented by the sum due to him for the unexpired period of***

[3] 1952(3) SA 121 (C) 127 Also cited with approved in Louis Volschenk v Pragma Africa (Pty) Ltd Case No, 414/2013 **unreported at paragraph 23.**

the contract less any sum he earned or could reasonably have earned during such latter period in similar employment".

[18] The sum total of the above position of the law means that Applicant is entitled to damages where the termination of their contractual relationship has been brought to an end through the employer's unlawful conduct. Herein, Applicant's entitlement is based upon the parties' contract, and not upon the terms of our law of unfair dismissal. There being no dispute that sixteen (16) months remained in Applicant's fixed -term contract when it was terminated on the 9th October 2017. This Court having already made a finding that the said termination was unlawful, it therefore follows that judgement must be entered, in favour of the Applicant, in respect of all the contractual damages claimed by her, being the sixteen (16) months loss of wages except the claim for gratuity. As for Applicant's claim for gratuity (pro rata), same is not tenable by reason of the fact that the termination of the contract did not occur as a result of *"mutual consent",as* per clause 7.1 of the partie's agreement.

[19] Regarding Applicant's claim for unfair dismissal as per our labour laws, the CoUli has had recourse to the provisions of **Section 4 (1) (b) of the Industrial Relations Act,1980 (as amended)** and come to the conclusion that Respondent's procedural omission appeared to have been one of inadve1iency rather than wanton disregard of the law. This we discerned from the evidence of Respondent's witnesses who piimed Respondent's defence on the fact that Applicant was, infact, privy to the financial status of the organization.

[20] Having taken into account all the relevant facts, including the peculiar circumstances of the Respondent, the interests of justice and fairness, the Court will enter judgement in favour of Applicant as follows:

20.1 Notice Pay	E8, 500.00
20.2 Additional Notice	E 636.36
20.3 Severance Allowance	E 1.590.91
20.4 Sixteen (16) months loss of Earnings	E 136.000.00
20.5 Two (2) months for unfair dismissal	E 17.000.00
TOTAL	El63, 727.27

The Members Agree.

M.M.THWALA

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant : Mr M. Mtjali.

For Respondent Mr G. Mhlanga