

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No.43/2020

In the matter between:

CELIMPILO HLANZE

Applicant

And

**UNITED PLANTATIONS (SWAZILAND)
LIMITED T/A TAMBUTI ESTATE**

Respondent

Neutral Citation: Celimpilo Hlanze vs United Plantations (Swaziland) Limited
t/a Tambuti Estate (43/2020) [2022] SZIC 87 (12 July, 2022)

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

DATE HEARD: 31st March, 2022

DATE DELIVERED: 12th July, 2022

SUMMARY: *The Applicant has brought an application against the Respondent for unfair dismissal, wherein he alleges that he was being victimized by management for his union involvement. The main reason advanced by the Respondent for the dismissal was that the Applicant's position was redundant. The Applicant argued that the*

criterion for the redundancy was neither fair nor reasonable in the circumstances.

JUDGEMENT

- [1] The Applicant is Celimpilo Hlanze, a Liswati male adult of Maloma area in the Lubombo Region, and former employee of the Respondent.
- [2] The Respondent is United Plantations (Swaziland) Limited t/a Tambuti Estate, a company with the capacity to sue and be sued in its own name duly registered and incorporated in accordance with the company laws of Eswatini carrying on business at Tambuti and Ngonini in the Lubombo and Hhohho Regions respectively.
- [3] The Applicant alleges that he was unfairly dismissed by the Respondent and in his evidence in chief the Applicant testified under oath that:-
- 3.1 He was employed by the Respondent on or about late March 2010 as a pump attendant and four months later he was transferred to be a pipe fitter assistant. On or about April 2014, the Applicant was called by his supervisor Louis Khumalo who advised him that Mr. Fourie, the Production Manager had given instruction that the Applicant goes back to assist at pump station A after the dismissal of Sabelo Khumalo. The Applicant was advised that it was a temporary arrangement whilst the replacement of Sabelo was being sought.
- 3.2 He performed his duties even though the working conditions were not conducive, as he was being treated unfairly by Mr. Fourie who

was now supervising the Applicant instead of Mr. Khumalo, the immediate supervisor. The Applicant mentioned that Mr. Fourie would use a motor vehicle to travel to the pump station that Applicant was stationed at, whilst the Applicant was using a bicycle, Mr. Fourie would arrive first at the pump station and would then reprimand the Applicant for being late. At times he shouted at the Applicant and scolded him for not performing his duties, whereas the pump would sometimes have faults that needed to be fixed, which faults were reported to the immediate supervisor. Furthermore, Mr. Fourie would make funny gestures like mimicking a monkey, those acts disturbed the Applicant.

3.3 He enquired from his colleagues from the other pump station if they were being supervised by Mr. Fourie and also receiving the same treatment he was getting, they answered to the negative. After hearing the response from his colleagues the Applicant then realised that he was being victimized for being the branch secretary of their trade union, the union had recently engaged in a strike. The Applicant ended up reporting the unfair treatment to the Human Resources office. Wherein Mr. Rudolph Matsenjwa the Human Resources Manager called a meeting between the Applicant and Mr. Fourie to reconcile and also resolve the issues that were prevailing between the parties. The Human Resources Manager advised Mr. Fourie not to supervise the Applicant as that was the responsibility of Mr. Louis Khumalo, the Applicant's immediate supervisor.

3.4 on the 1st November 2017 the Applicant was called to a meeting by Mr. Fourie together with the Human Resources Manager Mr. Matsenjwa, whereby the Applicant was advised that there would be some changes at pump station A, his services would no longer be

needed, and it was appropriate that he be transferred to the banana section as an orchard man which position was on grade A2 whilst he was on grade A3 as a pump attendant. The Applicant pointed out that he was not agreeing to the transfer and further raised an issue that he was not represented at the meeting. The Applicant was then advised to attend another meeting at a later date with a representative.

3.5 The next meeting was held on the 8th November 2017 between the Applicant, his representative Mr. Mancoba Dlamini, Mr. Rudolph Matsenjwa and Mr. Fourie, wherein the Applicant was advised that his position as a pump attendant was redundant, therefore him and his representative should come up with solutions as to how the redundancy could be avoided. The Applicant and his representative requested that the issue of redundancy must be dealt with by the relevant structures, being the executive committee of the union, the top management of the company, including the company at Ngonini, however, the Applicant and his representative were advised that it was too late to convene the said structure and the meeting proceeded. He then requested to be furnished with the organogram of the United Plantations Company, history of the affected employee being the Applicant. They were promised to be furnished with the information through communication between the Human Resources Manager and the Applicant's representative.

3.6 The organogram was to assist the Applicant in identifying vacant positions within the United Plantations as a whole for the reason that the Applicant and his representative believed that there were positions that were vacant, or else some of the employees were about to retire, the Applicant would then be placed in whatever position

that opened up, as it was his position only that was faced with the predicament of redundancy.

3.7 Whilst awaiting the requested information, the parties received a short message from the Human Resources Manager, talking about the Applicant's employment history, however that message was not satisfactory in that it only stated that the Applicant was employed on the 5th April 2010, and that he has remained in that position until 2017. A lot of information was lacking from what the Human Resources Manager had sent to Applicant's representative. It was not included that the Applicant was transferred in 2014 to install and fix pipes, was also a substitute driver when his supervisor was not there. This information would have been used to assist the Applicant in avoiding the redundancy as it would have made it easier for him to be transferred to other positions, for the reason that he was capable of performing other duties, other than being a pump attendant.

3.8 After 3-4 days of receiving the Applicant's employment history from the Human Resources Manager, the Applicant received a letter from the Respondent dated 4th December 2017 terminating his services, whilst awaiting the organogram from the Respondent. The letter indicated that the LIFO principle was applied in selecting the Applicant for redundancy. The Applicant mentioned that he did not agree with the Respondent's LIFO's principle cited in the letter terminating his services on the following bases:-

- (a) There were other employees that were employed after him being Zweli Mamba and Sabelo Khumalo, who were performing the same duties as the Applicant.

(b) The Respondent hired employees to do specific jobs but later on those employees would be tasked with performing other duties other than those they were employed for.

3.9 The Applicant did not call any witnesses and in closing his case he prayed that he be granted an order for re-instatement or else the Respondent pays him additional Notice and Maximum compensation for the unfair dismissal.

[4] The Respondent called in two (2) witnesses, Mr. Louis Khumalo was the first to testify, he testified under oath that:-

4.1 He was employed by the Respondent in 1984 as a truck driver, in 1985 he was transferred to the irrigation department. He knew the Applicant as he worked with him in the irrigation department, he was his supervisor, they worked closely with the Applicant when installing and fixing pipes. Their working relationship came about after Mr. Khumalo went to his supervisor Mr. Fourie to request for employees that would assist him in fixing and installing pipes in the fields. His supervisor advised him that he would not employ any person, as a result thereof he would work with the Applicant. They worked together from 2011 to 2014. The reason the Applicant was chosen was that he was young, fit, educated and had a sharp mind, as the nature of the job required a person with such qualities.

4.2 Other than stating that he was Applicant's immediate supervisor, this witness was of not much assistance to the Court, except to corroborate Applicant's evidence on victimization, in that he admitted under cross examination that on day Mr. Fourie called him enquiring about the Applicant's whereabouts, as Applicant was not

at his work station. The witness admitted that the time Mr. Fourie called him was about 1200 hours in the afternoon, the time at which Respondent's employees are on their lunch break.

[5] The Respondent's second witness was Mr. Rudolph Zama Matsenjwa, who testified under oath that:-

- 5.1 He is employed by the Respondent as a Human Resources Manager, and has been working in the same position for twenty four (24) years now. He knows the Applicant because he is a former employee of the Respondent and he was involved in the process of his hiring. He further told the Court that the Applicant was employed as a general labourer his position was that of a pump attendant, his duties on a day to day basis were to clean the river sand from the pumps so as to make sure that the sand did not damage the pumps.
- 5.2 The company then decided to implement changes at pump station A, where the Applicant was stationed. A new pump was installed which was able to avoid the sand from entering into the pump, hence, there was now no need for a person to clean the pump. When the change came about at the Applicant's work station, he was called by his head of department and his supervisor, he was advised that as a result of the change his position was now redundant. The union and branch committees were also made aware of the changes. The Applicant was further advised that the intention was not to fire him as there was a banana planting programme that was being introduced, he was told to take the position of orchard man, however, the Applicant was not happy about that position. His concern was that the position of orchard man was lower in grade compared to the position he was currently holding. The company assured him that his salary was not to be affected.

5.3 The company further requested the Applicant to come up with alternatives that could assist in avoiding the redundancy. The Applicant suggested that if there were no vacancies at Tambuti estate, alternative vacancies should be sought for at Ngonini estate. He again requested for the company's organogram to assist him in identifying whether or not any vacancies existed. The company's management informed the Applicant that the Ngonini estate had its own budget and operated separately from Tambuti estate, there were also no available vacancies.

[6] It was the witness contention that the Applicant did not bring any meaningful suggestions to avoid the redundancy hence, his services were terminated. Only the Applicant was affected by the changes that were made. Furthermore the Applicant was not provided with the organogram as the company was of the view that it was not going to assist in this matter. At the close of its case the Respondent prayed that the Applicant's application be dismissed.

[7] It is common cause that the present matter involves a redundancy inquiry and not as disciplinary one. In terms of the law the burden of proof is on the Respondent to prove that there was a *bona fide* reason for the restructuring exercise. **Section 42 (2) (a) and (b) of the Employment Act 1980 (as amended)** provides that:-

42(2) "The services of an employee shall not be considered as having been fairly terminated unless an employer proves:

(a) That the reason for termination was one permitted by section 36,
and

(b) That taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee."

[8] The import of the above section is that the decision to restructure must be reasonably made in good faith and there must be a commercial rationale for the restructuring. *In casu* the Applicant was the only employee earmarked for redundancy, hence, in the circumstances, the Court must closely scrutinize the circumstances and reasons for the redundancy to ensure that the decision to abolish the Applicant's position was genuine and not a ruse to get rid of the Applicant.

[9] On the version of the Human Resources Manager the decision to abolish the Applicant's position was taken in October 2015 in a consultative meeting with the union, but did not give the date, place and the names of those who were present during that particular meeting from both sides. In the absence of any record or minutes of the consultative meetings, there is no evidence before Court to prove that the consultations did take place, or whether the consultations were comprehensive or merely cursory. Even if the consultative meetings took place in 2015, which allegation is disputed by the Applicant, the decision to render Applicant's position redundant was already taken by Respondent unilaterally and arbitrary without any proper consultation with Applicant and his union representative first.

[10] The version of the Applicant is that on the 1st November 2017 the Applicant was called to a meeting by Mr. Fourie, the Human Resource Manager was also in attendance. The Applicant was unaware of the agenda of the meeting, hence he attended the meeting alone. In the meeting the Applicant was advised that there would be some changes at the Pump Station where the Applicant was stationed, as a result thereof his services were no longer needed, as his position was now redundant.

[11] During the meeting the Applicant raised concerns that he was unrepresented, the meeting was then postponed to the 2nd November 2017 wherein the Applicant was invited to attend together with a fellow employee for Applicant to give reasons or opinions that could be explored to avoid the redundancy. The Respondent further advised the Applicant that in the event that no options were found the redundancy will be unavoidable.

[12] It is noted that no prior/proper consultation was held before the decision to render Applicant's position redundant was taken by the Respondent. It was a unilateral and arbitrary decision of the Respondent. The union and the Applicant had no input on the criteria to be used in selecting the number of employees to be affected and there was no determined period for which the retrenchment exercise was to take. The Respondent only initiated consultation when it was implementing the decision it had already taken in November, 2017.

[13] In *ATLANTIS DIESEL ENGINES (PTY) LTD V NATIONAL UNION OF MINEWORKERS OF SOUTH AFRICA* (1994) 15 ILJ 1247 9(A), the Court held that:-

"The duty to consult arises at the time the decision to retrench is made, not when it is implemented. Parties are to engage each other in an attempt to reach consensus on measures to avoid, minimize or change the timing of the retrenchment, and the obligation is on the employer to use its own initiative to take whatever steps may be appropriate in this regard...It is trite that the employer is required to act in good faith in this process and that even if a retrenchment may be justified by its financial position, a genuine attempt to consult is still required. The decision to retrench must not be a fait accompli. Where the employer frustrates the purpose of the

Act or fails to comply with its statutory obligations, the retrenchment is procedurally unfair."

- [14] The purpose of consultation is to explore options identified by the employer, to solicit further options from employees and to seriously consider them. Employers, employees and their representatives should have the opportunity to consider and exhaust all reasonable alternatives to ensure, as far as possible the economic survival of the business and the livelihood of those it employs. To confine the requirement of consultation to the implementation of a decision to, for example close a department or contract out a particular function is to deny this opportunity.
- [15] It is again required of an employer to establish fair and objective criteria when identifying employees for retrenchment. The criteria must be implemented in a fair, objective and transparent manner. It is now accepted that an employer in selecting candidates for redundancy may rely on criteria such as productivity and conduct and not be confined to the last in, first out (LIFO) principle.
- [16] The purpose of an objective, pre-determined selection is to ensure that selection does not depend solely upon the subjective and personal opinion of the person making the selection. Otherwise the fairness of the process may be tainted by unreasonable preferences, prejudices and favours.
- [17] The intrinsic value of having objective criteria was explained as follows in **WILLIAMS V COMPAIR MAXAM LTD [1982] ICR 156**, where the Court stated as follows:-

"The purpose of having, so far as possible objective criteria, is to ensure that redundancy is not used as a pretext for getting rid of employees whom some managers wished to get rid of for other reasons. Except in cases where the criteria can be applied automatically (for example last in, first

out) in any selection for redundancy elements of personal judgements are bound to be required, thereby involving the risk of judgement being clouded by personal animosity. Unless some objective criteria is included, it is extremely difficult to demonstrate that the choice was not determined by personal likes and dislikes alone."

[18] When an employee is singled out and made redundant by a bogus restructuring unprompted by any commercial requirement or need, the inference of victimization is compelling. We find that the Applicant's retrenchment was an act of victimization. We also find that the reason for the sham retrenchment was because the Applicant was a Swaziland Agricultural Plantations and Allied Workers Union branch Secretary General, at the time he was transferred back to the pump station, it was during the period the workers were from participating in a lawful strike action. Furthermore, the Applicant's working conditions were not conducive as he was being ill-treated by Mr. Fourie, the Respondent's production manager whereas the other pump attendants were not subjected to the same ill-treatment. The victimization got so serious that the Applicant had to report about it to the Human Resources Office.

[19] It must be pointed out that Mr. Fourie was not called to testify on behalf of the Respondent, the Applicant's evidence explaining his victimization remains intact and unchallenged.

[20] For the above reasons the Court finds that the termination of the Applicant's services was substantively and procedurally unfair for the following reasons:-

- (i) The Respondent did not conduct proper consultation with the Applicant prior to his retrenchment.

- (ii) The Respondent did not consider ways to avoid or minimize the retrenchment.
- (iii) The Respondent did not apply a fair selection criterion when making the Applicant's position redundant.

[21] The Applicant in his application has prayed that the Court grants him an order in the following terms:-

- (i) **Re-instatement or compensation in the form of Additional Notice pay and Maximum Compensation.**
- (ii) **Costs of application.**

[22] In the circumstances the Court cannot order re-instatement on the basis that it would be impracticable as a number of years has lapsed since the Applicant was dismissed. Although re-instatement is the primary remedy whenever an employee is unfairly dismissed, it is a suitable remedy only if labour disputes are resolved expeditiously which was not in the present matter. This matter has been heard almost seven (7) years after the Applicant was dismissed. The impracticability of resuming the employment relationship will increase with the passage of time. **Section 16(2) of the Industrial Relation Act 2000 (as amended)** states that if continued employment would be intolerable or if it has become impracticable to take the dismissed employee back into the position he/she previously held, compensation should be ordered.

[23] Having taken into account the personal circumstances of the Applicant, his seven (7) years of service with the Respondent and the element of

victimization inherent in the manner in which the applicant was dismissed under the guise of redundancy, the Court awards compensation as follows:-

(i) Additional Notice pay: $E\ 3,284.51 \div 21 = E156.40$

$156.40 \times 4 = E625.60$

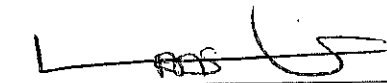
$625.60 \times 6\ \text{years} = E3,753.60$

(ii) Maximum compensation $E3,284.51 \times 12\ \text{Month} = E39,414.12$

(iii) The Respondent is to pay the cost of suit.

[24] The amount is payable within fourteen (14) days after delivery of this judgement.

The members agree.



L. MSIMANGO

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANTS: Mr. M. Nsibande
(Mongi Nsibande & Partners)

FOR RESPONDENT: Ms. Q. Dlamini
(Musa M. Sibandze Attorneys)