IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No.375/2022

In the matter between:

Applicant

SIKHUMBUZO NKAMBULE

And

LIDWALA INSURANCE COMPANY Respondent

Neutral Citation	:	Sikhumbuzo Nkambule vs Lidwala Insurance Company, Case No. 375/2022 [2023] SZIC 07
Coram	:	**L. MSIMANGO - JUDGE** *(Sitting with Mr. S. Mvubu and Ms. N. Dlamini - Nominated Members of the Court)*
DATE HEARD	:	20th December 2022
DATE DELIVERED	:	3rd March 2023

Summary : **The Applicant alleges that he received a letter from the Human Resources Executive on the 24th October 2022, inviting him to a consultation meeting at the Human Resources Offices at 8:30a.m on the 25th October 2022. Wherein he was advised that his position was now redundant. The Applicant argues that this amounted to a short notice, and further that the Respondent unilaterally and arbitrary took a decision to repudiate the permanent contract of employment in a hasty manner and without positively engaging the Applicant in the process. The court is now called upon to decide whether or not the decision by the Respondent with regards to notifying and engaging the Applicant can be said to be within bounds of the law.**

JUDGEMENT

[1] The Applicant is Sikhumbuzo Nkambule an adult Liswati male of Ntondozi area in the Manzini District, and also an employee of the Respondent duly holding the position of Business Development Manager.

[2] The Respondent is Lidwala Insurance Company, a company duly established in terms of the Company laws of Eswatini, with limited capacity to sue and be sued in its own name and with its principal place of business situated at office No.7, Sivuno Building, Manzini District.

[3] The Applicant has brought an Application against the Respondent seeking an order in the following terms:

3.1 Dispensing with the normal forms in terms of timelines, manner of service and hear the matter as one of urgency.

3.2 That the letter dated 25th October 2022 issued by the respondent to the Applicant is hereby set aside.

3.3 Declaring that the terms of the permanent employment contract entered by and between the Applicant and the Respondent on the 6th October 2021 are binding and enforceable.

3.4 Declaring the letter dated 25th October 2022 purporting to retrench the Applicant from work and breaching the subsisting contract of employment as null and void.

3.5 Pending finalization of this matter, the effectiveness of the letter dated 25th October 2022 is hereby stayed.

3.6 Declaring the deprivation of the right to attend work as per the letter dated 25th October 2022 to amount to an unfair labour practice and deprivation of the right to be heard.

3.7 Compelling the Respondent to comply with the terms and conditions of the Applicant's contract of employment concluded on the 6th October 2021 forthwith or alternatively:

3.7.1 Directing the respondent to pay the Applicant in terms of the contract of employment concluded on the 6th October 2021, a maximum compensation for a period of twelve (12) months in the sum of E756,000.00 (Seven Hundred and Fifty Six Thousand Emalangeni)

3.7.2 Directing the respondent to pay the applicant's car allowance for a period of twelve (12) months amounting to E180.000.00 (One Hundred and Eighty Thousand Emalangeni).

3.7.3 Directing the Respondent to pay the Applicant fuel allowance for a period of twelve (12) months amounting to E72,000.00 (Seventy two Thousand Emalangeni)

3.7.4 Directing the Respondent to pay the Applicant accruing leave pay amounting to E112,768.48 (One Hundred and Twelve Thousand Seven Hundred and Sixty Eight Emalangeni Forty Eight cents)

3.7.5 Directing the Respondent to pay the Applicant medical aid for a period of twelve (12) months amounting to E57,312.00 (Fifty Seven Thousand Three Hundred and Twelve Emalangeni)

3.7.6 Directing the Respondent to pay the applicant cellphone or communication allowance amounting to E24,000.00 (Twenty Four Thousand Emalangeni)

3.7.7 Ordering the Respondent to pay the Applicant E15,750.00 (Fifteen Thousand Seven Hundred and Fifty Emalangeni) which was unlawfully deducted from the month of July 2022 salary.

3.8 Costs of suit at punitive scale.

3.9 That a rule nisi to operate with interim and immediate effect be issued in terms of the above prayers and returnable on a date to be determined by this Honourable Court.

3.10 Further and / or alternative relief.

[4] The Applicant argued that:-

He is an employee of the Respondent by virtue of an employment contract signed on the 6th October 2021, and holds the position of business development manager. The Applicant argued further that he never applied for the position, but was handpicked as the post was never advertised. He was invited by the Managing Director to forward his curriculum vitae, as the Respondent was looking for someone with his skills and experience to head both marketing and business development.

4.1 He underwent a six (6) month's probation period and upon the completion of the probation period, during the month of April 2022 confirmed by the Respondent to a permanent position of business development manager.

4.2 On or about the 24th October 2022 and on a short notice, the Applicant received a letter from the human resources executive inviting him to a consultation meeting at the human resources offices as 8:30a.m on the 25th October 2022, as his position was considered redundant.

4.2.1 The Applicant duly attended the meeting, wherein he requested to be advised on the criteria that was used in rendering his position redundant as the company had achieved the previous year targets and was constantly meeting monthly targets in the current year. Furthermore, he also wanted to be advised on the options considered by the company to avoid the redundancy.

4.2.2 The Applicant also sought to understand if the company had considered the principle of Last in – First out, as there were junior staff under his portfolio who were employed later than the Applicant.

4.3 The Applicant submitted that the Human Resources Executive dismally failed to respond to the his concerns, she advised the Applicant that such concerns will be submitted to the Investment cluster CEO for consideration and response. The Applicant argued that the investment cluster CEO is heading Inyatsi Group of Companies and not the Respondent, and that same is quite confusing because it is the Managing Director of the Respondent who has to come forth with responses to the concerns regarding the redundancy.

4.4 It was Applicant's submission that without any response to the concerns raised with the Human Resource Executive on the 25th October 2022, the Applicant received a letter confirming that his services were being terminated. The Applicant alleges that the manner in which the exercise was being conducted constitute an unfair labour practice on the part of the Respondent. The letter was to come to effect on the 30th November 2022, it further stated that

the Applicant was not required to report to work upon receipt of same.

4.5 Upon receipt of the letter from the Respondent, the Applicant duly filed his response through a letter dated 9th November 2021, wherein the Respondent was being reminded about the concerns raised with the Human Resources executive that were not responded to. The Applicant received a response to the letter, however, the contents were on a without prejudice basis.

4.6 The Applicant submitted that the letter terminating his services constitutes an unfair labour practice and is null and void for the following reasons:-

(a) There has never been any retrenchment process at Respondent as the consultation exercise was not exhausted.

(b) The purported retrenchment exercise was flouted in light of the fact that the human resource executive failed to respond to Applicant's concerns for his position to be rendered redundant.

(c) The Applicant never received any response on what attempts were done to avoid the redundancy, such renders the purported consultation exercise to be a sham, therefore Respondent's letter of termination seeks to purportedly repudiate the binding terms of the permanent contract of employment through a document that is a nullity and is not birthed by any preceding retrenchment or redundancy, hence, it is unacceptable in law and as such has no legal effect and is void.

[5] In return the Respondent raised the following points of law:-

5.1 **The matter is fraught with factual disputes:-**

In this regard the Respondent argued that it is trite that as a general rule, it is undesirable to decide an application upon an affidavit where the material facts are in dispute. Further that, it is evident that there is a dispute as to the processes that preceded the meeting of the 25th October 2022, amongst others is whether or not the Applicant was prepared to be consulted, and whether or not the Applicant's concerns were addressed.

5.1.2 The Respondent submitted that where factual disputes exist, the court should not entertain the matter. However, in the event that the court is inclined to deal with the matter on the papers notwithstanding the existence of the factual dispute, it will do so in view of the facts stated by the Respondent together with the admitted facts in the Applicant's affidavit and make an order giving effect to such findings, and this is known as the plascon Evans Rule, wherein, the Court effectively decides the matter on the Respondent's version.

5.1.3 In response there to, the Applicant argued that the facts giving rise to the present matter are that of redundancy which has processes and procedures, of which the employer jumped the gun by terminating the Applicant's services before the process could be exhausted. Therefore, the employer's action offends the principle of fairness, and once there is a manifest injustice the innocent party has the right to approach the court for redress.

5.1.4 The established and trite judicial practice which now determines the approach of the courts worldwide, is that a

court cannot decide an application on the basis of opposing affidavits that are irreconcilably in conflict on material facts. So where the facts material to the issue to be determined are not in dispute the application can properly be determined on the affidavits. It will amount to an improper exercise of discretion and an abdication of judicial responsibility for a court to rely on any kind of dispute of fact to conclude that an application cannot properly be decided on the affidavits. The court has a duty to carefully scrutinize the nature of the dispute with a Microscopic lense to find out the following:-

(a) If the fact being disputed is relevant or material to the issue for determination in the sense that it is so connected to it in a way that the determination of such issue is dependent on or influenced by it.

(b) If the fact being disputed, though material to the issue to be determined, but the dispute is such that by its nature, can be easily resolved or reconciled within the terms of the affidavits.

(c) If the dispute of a material fact is of such a nature that even if not resolved does not prevent a determination of the application on the affidavits.

(d) If the dispute as to a material fact is genuine or a real dispute.

5.1.5 A fact is material or relevant where the determination of a claim is dependent on or influenced fundamentally by it. Not all facts in a case are material, so it is only those that have a bearing on the primary claim or issue for determination in a

way that they influence the result of the determination of the claim one way or the other. It is conflicts or disputes on such facts that are relevant in determining whether an application can be decided on affidavits.

5.1.6 As the court understands, the present application is based on the question of law as to whether or not the Respondent flouted the process of consultation in as far as the redundancy or retrenchment of the Applicant is concerned. Hence, the court is of the view that there are no relevant irresoluble factual disputes which are real and genuine. In cases where no real genuine or material dispute of fact exists, the court is empowered to adjudicate a matter by way of application proceedings.

5.1.7 His Lordship Innes **C.J in FRANK V OHLSSON'S CAPE BREWERIES LTD, 1924 AD 289 @ page 294**, held that:-

"But where the facts are not in dispute, where the rights of the parties depend upon a question of law, there can be no objection, but on the contrary a manifest advantage in dealing with the matter by the speedier and less expensive method of motion".

5.1.8 The Court aligns itself with the dictum as expressed by the Honourable Judge in the above cited case. As a result the point of law on factual disputes is hereby dismissed.

5.2 The other point of law taken by the Respondent is that of ***jurisdiction***. The Respondent argued that the Application seeks an order that the court declares the termination of his services to be unlawful and for the contract of employment to be upheld. The

Respondent submitted that this Honourable court does not have jurisdiction to pronounce on the validity of a termination of a contract of employment wherein the court has not conducted its own enquiry on the circumstances giving rise to the termination.

5.2.1 The Respondent argued that in terms of the letter of termination of employment, such termination was with effect from 30th November 2022 on grounds of redundancy. The termination having been communicated and there being no prayer for an interdict means that the court does not have jurisdiction to set aside a termination of services unless and until the provisions of **Part VIII of the Industrial Relations Act** have been complied with. The Applicant's services having been terminated, means that he does not have a legal interest in any existing, future or contingent right unless and until the court finds that the termination was unfair and accordingly sets it aside.

5.2.2 The Respondent further argued that the Industrial Court does not sit as a court of review in respect of dismissal and accordingly the court will not come to the assistance of an employee who complains about an unfair termination unless and until he has exhausted the provisions of **Part VIII of the Act**, furthermore, the alternative prayers sought by the Applicant are incompetent for the reason that the court does not have inherent jurisdiction to grant such remedies. Its residual powers to grant remedies is contained in **Section 16 of the Industrial Relations Act**, and is exercisable once the court has made a determination that a termination was unfair. Hence, that court does not have power to order payment of

compensation and other benefits outside the ambit of **Section 16 of the Industrial Relations Act.**

5.2.3 The Applicant on the other hand argued to the contrary that the court has the necessary jurisdiction to adjudicate the matter in terms of **Section 8 of the Industrial Relations Act 2000**, and that the application is brought based on the unfair labour practices by the Respondent, It is only this Honourable Court that has jurisdiction to determine the egregious conduct by the Respondent, further that, there are quite a number of decisions wherein the court has come to assist where there has been an arbitrary decision by the employer, therefore **Part VIII of the Industrial Relations Act** is not applicable in issues emanating from a question of law.

5.2.4 The law regarding the jurisdiction of this Honourable court has undergone a change from what it was before the case of **Alfred Maia vs Chairman of the civil service commission and others – High court case No. 1070/2015**. This case ousted the jurisdiction of the Industrial Court where there was noncompliance with **Part VIII of the Industrial Relations Act.**

5.2.5 The decision of the Supreme Court in the case of **THE MINISTRY OF TOURISM AND ENVIRONMENTAL AFFAIRS AND THE ATTORNEY GENERAL V STEPHEN ZUKE AND SWAZILAND ENVIRONMENTAL AUTHORITY – SUPREME COURT CASE NO. 96/2017**, provided otherwise, wherein the Court held that:-

"The time has come for the judgement in the Alfred Maia case to be set aside as having been wrongly decided, when the Industrial Court determines a labour dispute between an

employer and an employee it does so within the ambit of its jurisdiction in terms of Section 8 of the Industrial Relations Act. This does not constitute review proceedings. In determining whether the dispute falls within the ambit of Section 8 of the Industrial Relations Act, the test is whether the dispute between the parties arise solely from a contract between employer and employee during the course of employment".

5.2.6 In the light of the above stare decisis the Industrial Court now has jurisdiction to hear and determine matters between an employer and employee where Part VIII of the Industrial Relations Act has not been followed with the caveat that the principle of fairness has not been followed.

5.2.7 The Applicant's complaint is one of fairness, hence the court is of the view that it does have jurisdiction to entertain the matter. Therefore the Respondent's point of law on jurisdiction is hereby dismissed.

[6] On the merits the Respondent argued that the restructuring exercise commenced in April 2022. The Applicant was part of this process and was apprised on the need to streamline operations, reduce costs and make the organization more efficient. The meeting of the 25th October was a culmination of a series of engagements which were integral to the decision communicated on that date. On that date the Applicant was notified of the decision pertaining to his position and the possibility of a retrenchment. He was engaged on ways and means of avoiding the potential job loss as well as the consequences of the decision.

6.1 It was explained to the Applicant that the organization was doing away with the position of Business Development Manager and as such, there was no criteria that had been identified as it was the Respondent's prerogative to restructure its operations in order to fulfill its organizational goals.

6.2 The Respondent submitted that the principle of last in first out does not find application where one position is being considered for redundancy, and this was explained to the Applicant. The Respondent took a long term view of its man power needs and concluded that it did not require a Business Development Manager having analysed market and economic conditions. The Respondent further determined that the functions of business development could be executed at a lower level and that they did not require a managerial employee.

6.3 At the conclusion of the meeting of the 25th October 2022 with the Applicant, further discussions were held by Senior Management to review the representations that had been made by the Applicant, having considered all of the submissions and the interests of the organization, it was resolved that the Human Resources Executive communicates the termination of the Applicant's services at the earliest opportunity, it was agreed that it would be unfair to keep the Applicant in suspense given the fact that the decision had since been taken.

6.4 The Respondent argued that whilst there is no legal obligation to consult on the reasons for the decision, the Applicant was apprised of the reasons that informed the decision of his position as being surplus to requirements. Furthermore, there has been a lawful and valid consultation with the Applicant as the Respondent has

complied with the procedural requirements for the retrenchment. In this regard the Respondent took into consideration the economic and operational factors in reaching the decision.

6.5 The Respondent submitted that the Applicant has an alternative remedy which is to invoke the procedures set out in **Part VIII of the Industrial Relations Act**, in the circumstances the Applicant has failed to make out a case for the relief sought, therefore the court should dismiss the application with costs.

[7] Like all dismissals, retrenchments must be both procedurally and substantively fair. Dismissal for operational requirements require that there must be a meaningful joint consensus seeking process in which the parties attempt to reach an agreement on a range of issues aimed at best, at avoiding retrenchment or if that is not possible, at ameliorating its effects and this procedure is termed consultation.

[8] Consultation entails the bona fide consideration of suggestions from the other party. Pre-retrenchment consultation is not merely a procedural requirement, it may be that consultation is found to be so woefully deficient as to render the ensuing dismissal substantively unfair. The Labour Appeal Court has held in the matter of **BROLL PROPERTY GROUP (PTY) LTD V DU PONT AND OTHERS (2006) 27 ILJ 269 (LAC)** that:-

"Poorly handled consultations could lead to a retrenchment lapsing from procedural unfairness to substantive unfairness as well".

[9] It is therefore important that employers comply with their duty to consult, furthermore, consultation must be exhaustive and thorough, not merely sporadic, superficial or a sham. Case law suggests that the test for whether there has been genuine consultation prior to a retrenchment is whether the employees concerned or their representatives were given a fair

opportunity to suggest ways in which job losses might be avoided or the effects of retrenchment on the workforce as a whole or on particular individuals might be ameliorated. The employer is not bound to accept these suggestions, however, they must be seriously considered.

[10] Basson J has succinctly elaborated in **MARITZ V CALIBRE CLINICAL CONSULTATIONS** (Pty) Ltd and Another that:-

"..... The courts have consistently required a high degree of fair treatment in retrenchment cases because it is recognized that the employee is being dismissed through no fault of the employee. Integral also to the whole retrenchment process is the requirement that the employer approaches the process bona fide and with an open mind especially with regard to measures and proposals to avoid retrenchment. An employer who approaches mala fide or with a closed mind in respect of alternatives or measures to avoid retrenchment can hardly come to court and argue that the dismissal was substantively fair".

[11] The purpose of holding consultation has been over emphasized by the courts, in that employers should not seek to rush the consultation process. It has to be meaningful and the employer must provide employees with all information necessary for consultation while giving them enough chance to reflect on the proposal. Alternatively the employees may be granted the right to provide measures to avoid dismissals and the employer ought to respond to them by giving reasons for disagreeing with each alternative.

[12] **STEENKAMP J** emphasized such purpose in **DE KLERK V PROJECT FREIGHT GROUP CC (C647/2014) ZALCCT 44**, wherein the employee requested to be provided with information prior to the implementation of the decision to dismiss him for operational requirements. This information related to, inter alia, the financial

statements of the business. The employer reasoned that the information was not pertinent to the Applicant's dismissal. The Judge held that:-

"It can be said that the parties are engaged in a meaningful joint problem solving exercise when the employer simply refuses to provide information that maybe relevant..... Consultation will not be held to be a mere pretense if the employer approaches the matter with a particular solution".

[13] In *casu* the Applicant submitted that there were concerns which he raised with the Human Resource Executive which were not responded to until he was served with a letter terminating his services, thus the employer has jumped the gun by dismissing him without being afforded the right to a proper consultation. The Applicant therefore elected to rely on invalid dismissal as a ground for setting aside the dismissal.

[14] Dealing with an invalid dismissal matter the Industrial Court of Appeal in the case of **ESWATINI AVIATION AUTHORITY V SABELO DLAMINI, ICA case No. 13/021**, held as follows:-

"..... Section 16 of the Act at first glance appears to be restricted to unfair dismissals. However, subsection 8 leaps to the eye, reading: where the court, in settling any dispute or grievance, finds that the employee has been disciplined or otherwise disadvantaged or prejudiced contrary to a registered collective agreement or any other law relating to employment, the court shall make an order granting such remedy as it may deem just ..... Section 8 (1) of the Act further sets out the jurisdiction of the Industrial Court to include any matter which may arise at common law between an employer and employee in the course of employment ..... it then follows that the common law concept of invalid dismissal forms part of our law and is justiciable by the Industrial Court".

[15] The facts obtaining in the above cited matter were as follows:-

"(a) The employer instituted disciplinary proceedings against the employee and the evidence phase thereof was concluded, after which the parties filed written submissions.

(b) The Chairman of the disciplinary hearing by way of electronic mail proposed to deliver a verdict without any reasons to which the employee's attorneys objected insisting on reasons to be provided.

(c) The employer issued a letter dismissing the employee, upon learning of this development, the employee's attorneys wrote to the employer to the effect that the letter of dismissal was viewed to have been invalidly issued in that the employee was yet to present submissions on mitigation and the employer was requested to withdraw the letter of dismissal. The employer declined to withdraw the letter of dismissal.

(d) The above culminated in an urgent application being launched with this Honourable Court, wherein the employee as applicant sought that the letter of dismissal be set aside. The court granted the said relief. The employer then filed an appeal with the Industrial Court of Appeal wherein it was held that an invalid dismissal is a nullity, in the eyes of the law an employee whose dismissal is invalid has never been dismissed and remains in his or her position in the employ of the employer".

[16] The Respondent's arguments that the restructuring exercise commenced in April 2022, and that the Applicant was part of this process, wherein he was apprised on the need to streamline operations, reduce costs and make the organization more efficient does not suffice. The Applicant only got to know on the 25th October that his position was redundant, and was served with the dismissal letter on the same day.

[17] Furthermore, the Respondent having submitted that it was resolved that the Human Resources Executive communicates the termination of the Applicant's services at the earliest opportunity, as it would be unfair to keep the Applicant in suspense given the fact that the decision had already been taken, it cannot therefore be said that the meeting of the 25th October 2022 amounted to proper consultation.

[18] In Usuthu Pulp Company Limited t/a **SAPPI USUTHU VS SWAZILAND AGRICULTURAL PLANTATIONS WORKERS UNION AND ANOTHER CASE No. 717/2006,** the Court held that:

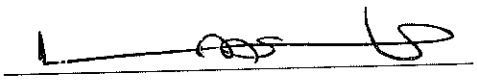
"Consultation involves seeking information, or advice on, or reaction to a proposed cause of action ..... It certainly does not mean merely affording an opportunity to comment about a decision already made and which is in the process of being implemented".

[19] In the circumstances, the court hereby makes the following order.

(a) The dismissal of the Applicant is hereby set aside.

(b) There is no order as to costs.

The Members agree.



L. MSIMANGO
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT	:	**MR K Q MAGAGULA** **SITHOLE AND MAGAGULA ATTORNEYS**
FOR RESPONDENT	:	**MR Z.D JELE** **ROBINSON BERTRAM**