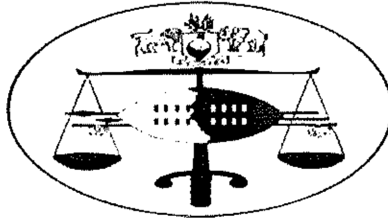

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No 222/2019

In the matter between:

VINCENT SENZENI MASUKU Applicant

And

HI-PRESS INVESTMENTS (PTY) LTD Respondent

NEUTRAL CITATION	:	Vincent Senzeni Masuku v Hi-Press Investments (Pty) Ltd, Case No. 222/2019 SZIC 92 [2024] (04 October 2024)
CORAM	:	**THWALA - JUDGE.** *(Sitting with Mr. M.T.E Mtetwa and Mr. A.M. Nkambule - Nominated Members of the Court).*
CLOSING SUBMISSIONS	:	27 June 2024.
JUDGEMENT DELIVERED	:	04 October 2024.

JUDGEMENT

Background

[1] The Applicant was an employee to whom the provisions of Section 35 (2) of the Employment Act, 1980, applied. He was employed by Respondent on the 2 January 2013, and his services were terminated on the 1 October 2019. He worked as a Mechanical Engineer, earning a salary of E 9, 320-00 per month.

[2] From the pleadings, Applicant's case appeared to suggest that it was premised on automatically unfair dismissal in that same was alleged to have taken place apparently for agreeing to act as a representative and spokesperson for his fellow employees who had certain grievances against the Respondent. Specifically, Applicant averred that he was asked to follow-up on certain grievances that Respondent's employees had such as the none-remittance of their SNPF contributions and none payment of overtime worked on Saturdays.

[3] Applicant alleged that it was as a result of the above actions that Respondent then unilaterally decided to declare his position to be redundant, which then resulted in the termination of his services on the 1 October 2019.

Respondent's Case

[4] In articulating its case, the Respondent started off by pointing out that Applicant was in fact not a mechanical engineer but a fitter and turner, a post that was said to be lower than that of a mechanical engineer. Respondent further denied that the termination of Applicant's services amounted to an unfair dismissal. Respondent's position was that what happened was that the post occupied by Applicant (fitter and turner) became redundant in September 2018, due to shrinkage of business within the industry.

[5] In its averments, Respondent went on to asset that Respondent had proceeded to close and shut down the fitting and turning department when Applicant left the company's employ in September 2018. Respondent went on to affirm that Applicant was fully consulted regarding the work shrinkage in the fitting and turning department. The shrinkage of business was said to have been well within Applicant's own cognizance because Respondent found itself providing this type of service to only one client, i.e Maloma Colliery.

[6] Regarding Applicant's allegations of victimization for raising certain grievances on behalf of the workers, Respondent vehemently denied any such claims. Notably, Respondent appeared to concede the element of none-compliance with the provisions of the provident fund laws which, however was subsequently corrected.

[7] As to the allegations that Respondent quickly replaced Applicant with another employee who proceeded to render the same services of being a fitter and turner, Respondent insisted that this particular employee had joined the company well before January 2013. Respondent closed its pleadings by denying that the company had, at any time, resumed operations in the fitting and turning department.

[8] In his evidence in-chief, Applicant told the Court that when he was employed, he brought in some special skill, i.e line boring. Applicant told the Court that this was a specialized skill which was not comparable to that of an ordinary fitter and turner. It was because of this special skill that Applicant requisitioned for the purchase of a certain machinery which was essential for the execution of his job.

[9] Indeed, it was after the acquisition of this machinery that Applicant started acquiring customers on behalf of the Respondent, which included Mhlume and Maloma Colliery. The latter customer stood at a different level because Respondent was already listed in the sources of supplies (the vendor list) for the

purposes of rendering other services to this customer. Applicant testified that whilst executing his duties at Maloma Colliery, he had an assistant whom Applicant was also expected to train.

[10] Then in 2017, (precise month not stated), Respondent's employees allegedly got to notice that their Swaziland National Provident Fund (SNPF) deductions were not being forwarded, by the Respondent to the Fund. The employees then requested Applicant, as a senior employee, to proceed and make enquires to the Respondent on their behalf. Applicant told the Court that he started noticing that his relationship with Respondent's Managing Director started to sour soon after the said inquiry. The situation became so worse such that Respondent issued a directive prohibiting its workers from holding any meetings within its premises.

[11] In September 2017, employees noted that Respondent had not bothered to rectify their SNPF remittance issue. Again, employees mandated Applicant to make a follow-up with the Respondent. Unfortunately, the engagements failed to yield any positive results such that employees then resolved to approach the SNPF offices for their intervention. In the meanwhile, Respondent proceeded to take away the keys for the company's motor vehicle that had been allocated to Applicant for the purposes of servicing Respondent's customers.

[12] Then on the 1 October 2018, the Managing Director called Applicant into his offices at 1645hrs, where he (Managing Director) gave Applicant a letter which advised that Applicant's post was now redundant. Applicant attempted to come up with alternatives in order to avert the termination of his services such as the reduction of his working hours to three days a week. Unfortunately, Applicant's proposal was not entertained by the Managing Director, who only advised Applicant to proceed to the Labour Department for the computation of his terminal benefits.

[13] Applicant proceeded to the Labour Department and returned with the computation of his terminal benefits on the 2 October 2018. Respondent released Applicant from serving his notice period but to utilize such period to look for alternative employment. And it was whilst still serving his notice that Applicant purportedly received a call from Maloma Colliery asking him to come over to render some services at the Mine. Applicant referred the customer to Respondent's Managing Director. Applicant then proceeded to tell us what he heard from other workers, i.e that Respondent did, in fact action the Mine's invitation to render services through the sending of other employees to execute the services on its behalf. Obviously, this part of Applicant's evidence was hearsay and nothing need be said more about it. This Court is, however obliged to take cognizance of Applicant's evidence to the effect that Respondent was still retained as a provider for the fitter and turner services at Maloma Colliery at the time of the termination of Applicant's contract.

[14] For his current status, Applicant told the Court that he was still continuing with his trade. For relief sought, Applicant prayed for the payment of overtime which he alleged that he had accumulated through being made to work on Saturdays from 0800hrs to 1300hrs since 2013 upto the date of his dismissal. Applicant was, however, not minded to give a particularized breakdown of the claim as contained in his statement of claim. Applicant further prayed for maximum compensation for his dismissal which he insisted that it was automatically unfair.

[15] Under cross-examination by Mr Simelane, Applicant made the following concessions:-

15.1 That, he was employed as a fitter and turner, not an engineer.

15.2 That, his year of dismissal was 2018, and not 2019.

15.3 That, there was some overtime that Respondent paid to him which, however was in respect of extra hours worked in the course of a particular week.

15.4 That the overtime that was included in the statement of claim was for the Saturdays which Applicant worked.

15.5 That, Applicant was the one who computed each of his monthly salary for eventual payment by Respondent.

[16] The issue of the Saturday overtime then occupied much of the cross-examination, from the question as to why Applicant kept silent about it for the period of his entire service with the Respondent. It was apparent that Applicant raised no issue with the none payment of this amount not only during the course of his service but also during the computation of his dues at the time of his termination. Mr Simelane took issue with Applicant's failure to disclose his claim for the services rendered on the Saturdays because the computations for the terminal benefits was done with the assistance of the Labour Department. In the result, same was said to constitute an afterthought which was only conceived when the dispute was reported with the Conciliation Mediation and Arbitration Commission (CMAC).

[17] At some point during cross-examination, Applicant went on to concede that the Saturday overtime claim (if any) did not include the entire duration of his employment with the Respondent. This then pointed to this then cemented the discomfort that this part of Applicant's claim had not been properly computed. Applicant, however, did insist that there was some money that was due to him which Respondent's Managing Director had refused to pay despite repeated demands for same from the employees.

[18] Regarding the issue of the declaration of Applicant's post as being redundant, Applicant did concede that he spent the better part of his working hours rendering service to Maloma Colliery, who were the Respondent's major customer.

Applicant proceeded to concede that the services for fitter and turner were his exclusive preserve as he was the only person who was possessed with such skill within Respondent. Then came in the question of the shrinkage of orders which Respondent attributed to the redundancy of Applicant's position. On instructions from the Respondent, Mr Simelane put it to the Applicant that sometime in 2018, Maloma Colliery decided to stop using Respondent's services for its fitter and turner requirements. This must have been around early 2018, because Mr Simelane went on to suggest that in May 2018, Respondent proceeded to convene a consultation meeting with the workforce, the purpose of which was to advise them (workers) about the financial status of the company.

[19] For his part, Applicant denied not only the allegation that the Mine had stopped using the services of Respondent, but also the allegations that Respondent ever convened such a meeting whose sole purpose was to alert Applicant about the status of Applicant's position. In fact, Applicant proceeded to assert that the rendering of his specialized service to the Mine only stopped way after his departure in October 2018. And its stoppage was allegedly due to the lack of sufficient skill on the part of the personnel that Respondent seconded to render the services to the customer whenever an assignment was availed to them. Of course this piece of Applicant's testimony appeared to be hearsay until Mr Simelane took the gamble and asked Applicant this question:

> **"Question - How did you come to know about the continuation of the rendering of the fitter and turner service by Respondent to Maloma.**
>
> **Answer - Through calls that Applicant received from one Sifiso Hlophe, who would call Applicant whilst at Maloma for 'on the spot' guidance."**

[20] At this point Respondent's Counsel closed his cross-examination and on re-direct, Applicant's Representative did nothing much except to reiterate that no consultation was undertaken by the Respondent prior to the termination of Applicant's services on the basis of the shrinkage of business. Secondly, Applicant insisted that Respondent continued to render services to Maloma Colliery post October 2018. The matter was then postponed, apparently because Applicant was intent on calling one of his former colleagues, this however proved not to be possible as a result of which Applicant applied to close his case.

[21] Respondent brought its Managing Director, Ntokozo Dlamini (RW1), who confirmed holding the aforesaid position the Respondent. He told the Court that as a fitter and turner, Applicant worked Monday to Friday together with two (2) Saturdays in a month. Applicant's basic monthly pay was said to be eight thousand emalangeni with the two (2) weekends paid as overtime. As to the alleged outstanding overtime for the two (2) Saturdays that Applicant worked in a month, RW1 told the Court that Applicant was responsible for the computation of any excess monies due to him, which he computed to RW1 for the eventual payment.

[22] On the graven of the Respondent's case, i.e the justification for the declaration of Applicant's position as redundant, RW1 told the Court that the company's sales started to decline due to competition. RW1 confirmed that Applicant had been responsible for all services relating to the fitting and turning, especially at Maloma Colliery. RW1 told the Court that on a certain weekend Applicant proceeded to Maloma in order to perform the task of servicing a particular machinery on site. The assignment could not be completed on the same day which meant that Applicant had to return the following day, i.e the Sunday, in order to complete the service.

[23] Whilst at Maloma Colliery on this day, RW1 alleged that Applicant then had an altercation with a supervisor at the Mine, a certain Mthupha. RW1 came to know about this when the customer called him to report the incident. It was RW1's evidence that he took it upon himself to organize another employee to go and complete the job that had been abandoned by Applicant. Thereafter, the customer made it clear to RW1 that Applicant was no longer allowed to enter its premises due to his alleged insolent behavior. It was at this time that RW1 took it upon himself to approach Applicant to ask him to go and tender his apologies to the Mine's supervisor. Applicant heeded RW1's advice and went there to apologize, but this appeared to have been done a little too late because soon thereafter the customer started utilizing the services of Precision Engineering in order to do the work that was previously done by the Respondent.

[24] Following the above development, i.e the advent of Precision Engineering onto Respondent's business space at Maloma Colliery, RW1 then convened a meeting so as to bring the employees upto speed, including the challenges that these developments were bringing onto Respondent's ability to continue trading. RW1 told the Court that it was at this meeting that various suggestions were explored, including engaging in a vigorous marketing strategy. Applicant acceded to the suggestion for embarking on a marketing strategy, for which a motor vehicle was made available to Applicant to visit potential customers. This was done by the Applicant, but unfortunately the exercise failed to yield any positive results, which then led RW1 with no other alternative but to declare Applicant's position as redundant.

[25] Mr Simelane questioned RW1 about the existence of other customers that were serviced by the Respondent such as the then Royal Swaziland Sugar Corporation (RSSC). RW1 confirmed that Respondent did provide services to RSSC from time to times. However, RW1 explained that the services that were rendered to RSSC by Respondent were sporadic and therefore not dependable. Regarding

Applicant's allegations about the continued use of the 'special tool' that Applicant had caused to be acquired **post** October 2018, RW1 told the Court that such allegations were not true as only Applicant had the skill and technical know-how for this special machine's use.

[26] RW1 conceded that Applicant's post was the only post that was declared as redundant in October 2018, even though Applicant's subordinate, one James Ngomane, was later also retrenched after the financial situation continued to decline for the worse.

[27] On the critical question of prior consultation, RW1 insisted that same took place some two (2) months before the termination of Applicant's contract. RW1 alleged that this was through a one-on-one session which was held in his office. It was during this one-on-one session that Respondent also offered Applicant the opportunity to access the 'special machinery' for his (Applicant) private use. The above consultations went on to give Respondent the impression that the parties were of the same mind especially because Applicant gave the impression that he understood the Respondent's financial predicament.

[28] RW1 refuted the allegations that one Siyabonga Dlamini was thereafter recruited by the Respondent as a replacement for the Applicant. Nor the allegations that the parties' relationship sored after the SNPF saga. RW1 told the Court that he was not aware that Respondent continued to receive orders for the rendering of services from the Mine after Applicant's departure. He, however conceded that Ngomane continued to go to Maloma Colliery for what RW1 termed as 'odd jobs'.

[29] To conclude his evidence-in-chief, RW1 told the Court that Applicant's proposal for the reduction of working hours was rejected by him because it was 'not workable.'

[30] Under cross-examination from Mr Dlamini, RW1 conceded that every employer was duty-bound to maintain 'payslips' for its workers. This emanated from the fact that Respondent had none such, but instead relied upon bank sourced statements for payments made to the Applicant. Obviously, this was awkward because bank statements lacked the necessary statutory particulars of each of the clusters as prescribed by the demanded Employment Act, 1980.

[31] RW1 insisted that the cancellation of the Maloma Colliery contract came about because of Applicant's insolent behavior which he displayed towards one of the Mine's supervisors. When RW1 was asked if there was any formal complaint from Maloma Colliery regarding Applicant's insolent behavior, RW1 said there was none. As to the question of Applicant's insolent behavior, Mr Dlamini suggested to RW1 that there never was any such but rather that Maloma Colliery's supervisor, the said Mthupha, got agitated by the fact that Applicant had come to Maloma without a certain part which was key in the servicing of the Mine's machinery. This was denied by RW1, who proceeded to tell the Court that, indeed the servicing of the customer's machine was eventually completed, on the very Sunday, by Applicant's assistant.

[32] RW1 confirmed that Respondent had a certain staff compliment that was responsible for servicing the needs of Maloma Colliery. RW1 confirmed though that Respondent did not declare the other staff member's positions as redundant in October 2018. The justification for the aforegoing posture of the Respondent was that their customer, i.e Maloma Colliery, had a problem with only the Applicant and not the others. When asked if Respondent had taken time to apply its mind to the facts of the case before acting, RW1 told the Court that Respondent did none such.

[33] Under further cross-examination, RW1 disclosed that the insolent behavior attributed to the Applicant was his failure to report for duty on the Sunday in order to complete the servicing of the Mine's machinery. The witness went on

to concede that Applicant's actions amounted to a misconduct, i.e refusal to take lawful instruction, for which Respondent opted not to charge Applicant. Instead, Respondent directed Applicant to go to the Mine's supervisor in order to tender his apologies.

[34] The question of the termination of Respondent's sub-contract with Maloma Colliery became an issue, with Mr Dlamini contending, on behalf of the Applicant, that same had been terminated due to the non-availability of qualified personnel to render the services required by the Mine after Applicant's retrenchment. For the Respondent's part, RW1 asserted that the discontinuation of this subcontract occurred because Maloma Colliery decided to grant same to another company.

[35] RW1 was then referred to the Respondent's letter of termination which was addressed to the Applicant and dated the 1 October 2018. Specifically, Mr Dlamini raised issue with the fact that the said letter omitted to record the circumstances that had precipitated Applicant's retrenchment, i.e the loss of the Maloma Colliery contract due to Applicant's insolence. This assertion appeared to tie in with the employer's duty to avail all relevant information to the employee standing to be affected by a retrenchment. In re-direct, Mr Simelane caused the witness to confirm that Respondent had no alternative post for the Applicant.

[36] Respondent denied that the termination of Applicant's services was unfair but insisted that the termination came about due to operational requirements. **Section of 2 the Employment Act** defines the socalled "no fault" dismissals under "redundant employee" as meaning an employee whose contract of employment has been terminated-

(a) ....

(b) ....

(c) because of any the following reasons connected with the operation of the business-

(i) ....

(ii) the closure of any part or department of the business;

(iii) marketing or financial difficulties;

(iv) ....

Since terminations for operational requirements come about through no fault of the employee, courts are duty bound to scrutinize these redundancies so as to ensure that employers do not use terminations for operational requirements as a disguise for a dismissal for misconduct.

[37] Thus, in the initial case of **Bonginkosi Zweli Mathunjwa v MA Dlamini Consulting Engineers (Pty) Ltd**[1], this Court had the occasion to state that an employee's redundancy must first be preceded by a notice duly issued to such employee (s) by the employer. This notice of redundancy must, as a matter of law, proceed to furnish the reasons that have given rise to the alleged redundancy of the employee(s), including the number of the employees whose positions stands to be affected by the redundancy. That these details must be included in the notice is beyond question so as to enable the employee to know whether the number of posts to be affected by the redundancies will be above five (5), in which case the provisions of **Section 40 (2) of the Employment Act** would have to be strictly complied with.

[1] Industrial Court Case No. 232/2015. 15 SZIC [2023]. Of course we are alive to the fact that Respondent partly succeeded on appeal. The success of the appeal was, however premised upon the interpretations of Section 8 of the Industrial Relations Act, 2000, as amended. See MA Dlamini Consulting Engineers (Pty) Ltd v Mathunjwa (09/2023) [2024] SICA 14 (5 June 24).

[38] **In Phyllis Phumzile Ntshalintshali v Small Enterprises Development Company. IC No. 88/2004**, this Court (as per Dunseith P. as he then was), had this to say:

> **"Para 25. An employer has the prerogative to structure its establishment and to determine the size and character of its workforce in the manner most suitable for its requirements. Where however a decision is made which results in the retrenchment of employees, the modern labour law provides procedural and substantive safeguards to ensure that the decision is bona fide and implemented in a fair and objective manner after reasonable effort has been made to avert or minimize the loss of jobs".**

For the employee, fairness in the decision to declare his post as redundant is found in the requirement of consultation prior to a final decision on retrenchment.

[39] Whilst giving a legal justification for the need for prior consultation before a retrenchment, the following words were used by the **South African Industrial Court of Appeal**[2]-

> **"This requirement is essentially a formal procedural one, but, as in the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale".**

The Court proceeded to state that the reasons for the scrutiny was not to second guess the commercial or business efficacy of the employer's decision, but to ensure that the ultimate decision arrived at was genuine and not a sham.

[2] SACTWU And Another v Discreto (JA 95/97) [1998] ZALAC 9 (22 July 1998).

[40] For the aforegoing reasons it is imperative that we determine whether Respondent's decision to declare Applicant's post as redundant was genuinely based on operational requirements of its business. Again, the **SACTWU Case** is instructive in that respect for it was there said:

> **"The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rationale grounds, having regard to what emerged from the consultation process".**

[41] In order to achieve an answer to the above principles of the law, the Court must then analyze the chronology of the events as narrated by the parties. The first being to take it for granted that the applicability of Section 36 (j) as read together with Section 2 and Section 40 of the Employment Act did not arise in the operations of Respondent's business until the Saturday wherein Applicant had an altercation with the Mine's supervisor at Maloma Colliery. We draw this conclusion from RW1's evidence who, in his evidence-in-chief testified to the effect that orders from the Mine, which was their main customer started to decline soon after Applicant's failure to report for duty at the Mine in order to complete the servicing of the machinery on that fateful Sunday.

[42] We also are prepared to accept that amidst the bad blood which lingered between Applicant and the Mine's supervisor, there then surfaced a competitor for Respondent's specialized services at the Mine, being Precision Engineering. During RW1's evidence, it was clear that he seemed to believe that the arrival of Precision Engineering on the scene at Maloma Colliery was directly linked to Applicant's refusal to report for duty on that fateful Sunday. Our aforegoing conclusion is borne by the trouble that was subsequently taken by RW1 of asking Applicant to go and apologize to Mine supervisor for his actions.

[43] It is critical to state that whilst it may be probable that the misunderstanding between Applicant and the Mine supervisor might have occasioned Respondent some considerable decline in its revenues, same however, did not exculpate Respondent from its bona fide duty to undertake consultations which was expected from the Respondent. In the case of **Solomon Myeni v Swaziland Cement Products (Pty) Ltd. IC Case No. 75/97**, the Court there said:

> **"the Respondent cited the "the worsening economic situation in the country" in Exh.1 as the reason for terminating the services of the Applicant. By merely making this statement, the Respondent has not in any way fulfilled the requirement of Section 36 (j) of the Employment Act. The Respondent's bald statement in which he simply ascribes the Respondent's financial plight to the general economic problems of the country is unacceptable. The reason is that there is no way the Court would know how the general prevailing economic conditions did affect the Applicant. The Respondent has not made a full disclosure of the financial state of affairs of the Respondent company to either the Applicant or this Court.**

[44] As already pointed above, it is the duty of this Court to ensure that the provisions of Section 36 (j) on redundancies are 'not used as a pretext for getting rid of employees whom some managers wished to get rid of for other reasons' (**Williams v Compare Maxam 1982 IR LR 83**). In his testimony, RW1 told the Court about meetings that were held between himself and the workers, the purpose of which was to come up with strategies to market the company in order to boost its revenues. We note that these meetings were general in nature, in other words, it was clear to all that these socalled meetings were not aimed at Applicant's department. We note further, that there were other employees that worked with Applicant under the department of fitter and turner. It therefore boggles the mind as to how and why Applicant's post was the only one that was

targeted for abolishment. And in the absence of any justiciable reasons for so doing, it therefore follows that the dismissal was substantively unfair.

[45] Then there are the requirements of fair procedure, which are the minimum requirements which must be met by Respondent before the finalization of the decision to terminate the employee's services. The need to consult finds favour from the belief that consultations may help to avoid retrenchments altogether or minimize it at the least. The above would come along with the reasonable notification so as to enable the employee(s) the opportunity to be heard. This process of consultation presupposes that each of the parties approaches the problem facing them with an open mind.

[46] Having had the benefit of seeing and observing both parties as they gave their evidence before us, the Court has no doubt that RW1 used and/or attempted to use Applicant's act of misconduct, i.e his failure to report for duty at Maloma Colliery on that fateful Sunday as a sham by which it then purported to claim the decline of its revenues. We say that it was a sham because RW1 appeared not to be open to any possible suggestions that were offered to him by the Applicant towards the mitigation of his employment. This goes to show that Applicant's representations were only met with a reaction to justify Respondent's final decision.

[47] Applicant has not expressed any wish for reinstatement and we therefore are of the view that it would not be proper for the Court to grant same.

[48] Having taken into account the personal circumstances of the Applicant, his five (5) years of service at the Respondent, and the dubious manner that was employed by Respondent in order to get rid of the Applicant, the Court awards compensation equivalent to eight (8) months of Applicant's basic remuneration.

[49] **In the result, judgement is hereby granted in favour of the Applicant for payment of the sum of E64, 000-00 we award. No order for costs even though**

there were multiple instances of devious behavior that were manifested by the Respondent against the Applicant.

The Members agree.

MANENE M. THWALA

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT	**:**	**MR E. DLAMINI.**
FOR RESPONDENT	**:**	**MR S.M. SIMELANE.**