IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 294/2002

In the matter between:

SINDI MKHWANAZI & 4 OTHERS APPLICANT

And

H. M. STATIONEY AND OFFICE EQUIPMENT RESPONDENT

CORAM:

N. NKONYANE : ACTING JUDGE

D. MANGO : MEMBER

G. NDZINISA : MEMBER

FOR APPLICANT : M. MKHWANAZI

FOR RESPONDENT : D. MADAU

JUDGEMENT-25 MAY 2004

The five Applicants in this matter are seeking a relief for an alleged unfair termination of their services by the Respondent. That the five Applicants were employed by the Respondent was not denied. The Respondent in its reply stated that the termination of the Applicants' services was lawful as it was due to financial difficulties which were communicated to the Applicants.

The Applicants are now claiming payment of their terminal benefits, payment of maximum compensation being equivalent of twelve months salary and costs.

The Applicants' evidence revealed AW1, Sindi Mkhwanazi was employed by the Respondent on 6th August 2001 and was terminated 31st January 2002. She was employed as a personal assistant to the Managing Director and was earning E2,100.00 a month, AW2, Sabelo Motsa was employed on the 1st March 2000 as a senior accountant. He was terminated on the 7* March 2002. He said he was given a notice pay of E6000.00. AW3, Zanele Lukhele was employed on the 22nd May 1995 in the accounting department. She was terminated on the 31st January 2003 and was earning E2,000.00 per month. AW4, Gugu Simelane was employed on the 10* July 1995 as a shop assistant. She was terminated on the 28th March 2002. AW5, Phumzile Dlamini was employed on the 3rd February 1992 as a shop assistant and was terminated on the 4th March 2002. The Applicants were each called and told that there was no more work for them.

AW1, AW2 and AW5 said they were each called by the personnel manager at 4.55 p.m. and told that there was no more work for them. AW3 and AW4 were also treated in similar fashion though they did not specify the time. The Respondent's evidence was that the Applicants were fairly terminated in terms of the law and in particular in terms of Section 36 (j) of the Employment Act of 1980. the Respondent told the court that the Applicants were redundant and it had rightfully retrenched them. The Respondent said it did explain the bad financial position to the employees and that the employees understood and co-operated with it. It was the Respondent's contention that the retrenchment that it carried out were not covered by Section 40 (2) of the Employment Act of 1980 as it did not involve five or more employees. It was argued by the Respondent's attorney that although there were five Applicants before court they were not terminated at once, and therefore Section 40 (2) did not apply. That was the defence of the Respondent in this matter.

The court must therefore make a determination whether Section 40 (2) of the Employment Act is applicable to the facts before court. Section 40 of the Act is entitled " Employer to give notice of redundancies". Section 40 (2) has the following;

"where an employer contemplates terminating the contracts of employment of five or more of his employees for reasons of redundancy, he shall give not less than one months notice thereof in writing to the Labour Commissioner and to the organization (if any) with which he is a party to a collective agreement and such notice shall include the following information –

(a) the number of employees likely to become redundant;
(b) the occupations and remunerations of the employees affected;
(c) the reasons for the redundancies; and
(d) the date when the redundancies are likely to take effect;
(e) the latest financial statements and audited accounts of the undertaking.
(f) What other opinions have been looked into to avert or minimize the redundancy".

In this case five Applicants have come to court. The evidence further revealed that the management of the Respondent met and a decision to retrench was taken. RW1 told the court that plus or minus twenty posts were earmarked. He did not however specify those posts. It is clear to the court therefore that the decision to retrench more than five employees having been made by the Respondent, it was bound to follow the provisions of Section 40 (2) of the Act. It was argued on behalf of the Respondent that the Section did not apply because the employees were retrenched on different dates and not on one occasion en masse. The court will reject this submission as it is not a proper interpretation of the Section. The Sections says that " where an employer

contemplates terminating the contracts .....". The clear and unambiguous meaning of these words is that as soon as the employer decides or intends to lay off five or more employees, it must follow the provisions of the Section to the letter. The fact that in this case the Respondent carried out the retrenchment exercise on a piece meal basis did not change or affect the decision by Respondent's management made in October and November 2001 to retrench about twenty employees. The Respondent did not deny that indeed after that decision was made the retrenchments were carried out, and that the five Applicants before the court were part of the employees that were retrenched after that decision was taken. The court therefore will come to the conclusion that the dismissal of the Applicants was unlawful as it was in violation of Section 40 (2) of the Employment Act.

The court will now proceed to deal with the prayers of the Applicants. In doing that the court will take into account the financial position of the Respondent. Although the Respondent did not show the financial statement of the undertaking to the Applicants, it did present it to the court. The record was not disputed by the Applicants' attorney. The financial statement was for the year ended 30 June 2001. It showed that the company was operating at a loss.

During the cross examination of the Applicants, it transpired that they were paid some of their terminal benefits. It also transpired that two of the Applicants accepted their terminal benefits in full and final settlement These were AW4, Gugu Simelane and AW5, Phumzile Dlamini. It was argued on their behalf that when they signed the documents they were merely signing to acknowledge receipt of the amount stated there and not that they did not have further claims against the Respondent. It was not argued on their behalf nor did they tell the court in their evidence that they were forced or tricked into signing the documents. Under cross examination they admitted that they could read and

write the English language. This point was raised and decided by this court in the cases of Titus Mahlalela v Inyoni Yami Swaziland Irrigation Scheme,, Case no. 105/90 and that of Eshel Mandlenkosi Tsabedze v Inyoni Yami Swaziland Irrigation Scheme, Case No. 143/90. In the first case

the Applicant signed accepting the sum of E2,528.35 as full and final settlement. The court found that it had no jurisdiction to re-open a case in which the parties have settled and payment in full and final settlement having been made and received by the Applicant. The court went on to point out at page three that:

"The Applicant has not raised question of coercion or fraud before nor did he replicate. This submission is finding its way before the court for the first time".

Similarly in this case the two Applicants did not raise the question of coercion or fraud before the court. In the second case the Applicant accepted a sum of E7,370.01 in full settlement of any claim against the Respondent. That evidence was not disputed by the Applicant, The court pointed out that the court was precluded from hearing the matter as it had been concluded by the parties.

The two Applicants being AW4 and AW5 are not therefore entitled to further claims from the Respondent. There was no evidence that they were forced or that their signatures were obtained by fraudulent means.

The evidence however revealed that AW4, Gugu Simelane did receive further amounts of money being E288.45 for leave, E2000,00 for notice pay and was also paid severance allowance. AW5, Phumzile Dlamini revealed also that she was eventually paid the sum of E4,705.22.

The court will now consider the benefits due to AW1, AW2 and AW3 ad seriatim. AW1- She was employed for five months, she is now employed by Swazi Pharm Wholesalers. She now earns E2,400,00 per month. She is married and has three

children. She was terminated on the 31st January 2002 and got the new employment in the middle of February 2002.

AW2- He was employed on the 1st March 2000 and was terminated on the 7th March 2002. He was therefore employed for two years and four months by the Respondent. He is now employed by the Swaziland Royal Insurance Corporation since January 2004. He now earns E4,800.00 per month. He is now getting a reduced salary. He started to work for the Swaziland Royal Insurance Corporation on three months contracts in October 2002. He stayed without a job for about three months. He is married and has one child.

AW3- She was employed by the Respondent on the 22nd May 1995 and was terminated on the 31st January 2002. She therefore worked for six years and eight months for the Respondent. She was earning E2,000.00 per month. She is not married and has one child. She is now employed by Mankayane Town Board since July 2002. She therefore stayed without a job for six months.

Having taken into account all me above factors, the court will make the following order;

AW1, Sindi Mkhwanazi - five months' salary in the sum of (E2,100.00 x 5) E10,500.00 as compensation.

AW2, Sabelo Motsa - Five months' salary in the sum of (E6,000.00 x 5) E30,000.00 as compensation.

AW3, Zanele Lukhele –

(a) Additional Notice (E78.90 x 20) = E 1,578.00
(b) Outstanding leave days (E78.90 x5) = E 394.55

(c) Five months' salary in the sum of

(E2,400.00 x 5) as compensation = E12,000.00

The amount to be payable within thirty days from the date of judgement There will be no order as to costs. The members agree.

N.NKONYANE

ACTING JUDGE - INDUSTRIAL COURT