

IN THE INDUSTRIAL COURT OF SWAZILAND**HELD AT MBABANE****CASE NO. 88/2004**

In the matter between:

PHYLLIS PHUMZILE NTSHALINTSHALI**Applicant**

and

SMALL ENTERPRISE DEVELOPMENT COMPANY**Respondent****CORAM:****P. R. DUNSEITH : PRESIDENT****JOSIAH YENDE : MEMBER****NICHOLAS MANANA : MEMBER****FOR APPLICANT : Z. JELE****FOR RESPONDENT : Z. SHABANGU****J U D G E M E N T - 16/08/07**

1. The Applicant was employed by the Respondent in 1978 and she was in the continuous service of the Respondent for a period of twenty-five years thereafter.

2. On the 31st October 2003 as she was knocking off from work, the Applicant was handed a letter which came as some surprise to her. The letter is signed by the Managing Director and reads as follows:
"NOTICE OF ABOLISHMENT OF YOUR POST AS A RESULT OF RESTRUCTURING

1. *Kindly note that The Small Enterprises Development Company Limited has decided to restructure its operations as a result of which your post is adversely affected in that it has to be abolished with its present functions being allocated to the other posts. This shall regrettably lead to your services being terminated with this undertaking.*

2. *The said restructuring shall take effect on or about the 30th November 2003. You are therefore called upon to attend a consultation meeting with me on the 12th November 2003 at my office at 9.30 a.m. in the forenoon to discuss this matter.*

3. *Kindly take note that at termination, you are entitled to be paid a statutory terminal package as follows:*

- (a) *1 month Notice*
- (b) *Additional Notice (being 4 days of each year x number of years worked less the first year x the daily rate)*
- (c) *Severance Allowance (being 10 days of each year x number of years worked less the first year x the daily rate)*

Outstanding leave days x the daily rate.

4. *Depending on the negotiations the Company is also prepared to offer a conditional package which would not*

disregard the first year on both the severance allowance and additional notice together with an additional month salary provided it is taken in full and final settlement of all and any issues arising from your employment by SEDCO.

5. *I am otherwise prepared to hear you on any issues you wish to raise during such consultation.*

6. *I trust in your cooperation.”*

3. The Applicant says she was taken aback by this letter because she was the Respondent's Personnel Officer yet she was not aware of any restructuring of operations, nor had she been given any inkling that her post was to be abolished.

4. The Applicant lost no time in responding to this letter, stating that she was not willing to attend a consultation meeting because the decision to abolish her post and terminate her services had already been taken and consultation after the event would be merely "window dressing." She accused the Respondent of victimizing her because she had reported a dispute (concerning stoppage of her annual salary increment) to the Labour Commissioner.

5. The Managing Director replied giving reasons for the restructuring and denying any victimization. Further correspondence passed between the parties. The Respondent extended the date for the consultation meeting to 21st November 2003, and urged the Applicant to attend.

6. The Applicant agreed to attend the meeting, but requested certain

documents to enable her to participate meaningfully. She requested:

- the intended structure and rationale for the restructuring;
- the framework for the re-distribution of her duties and functions;
- projections for the future regarding job creation;
- the Respondent's audited financial statements.

7. On 21st November 2003 the parties agreed to reschedule the meeting for 30 November 2003. The Managing Director then furnished the requested information in the following terms:

"1. The intended structure will be the one you know, with the exception that the position of Personnel Officer has been removed and a new position of Chief of Operations has been created as assisting to the Managing Director.

2. The distribution of your work will be such that what is purely personnel work will be transferred to the Finance and Administration Department and the rest to the Legal Affairs/Board Secretariat.

3. To the best of my knowledge there are no new positions likely to be created in this case since this is not a retrenchment but an abolishment of your position due to restructuring."

8. The Applicant was not satisfied with the information provided. She

wrote again requesting for the intended new structure and the financial statements. She stressed that she was attending the scheduled meeting for purposes of consulting on ways and means of avoiding her retrenchment only.

9. From the minutes of the meeting on 30th November 2003, it is apparent that the parties disagreed from the outset regarding the purpose and agenda of the meeting. The Managing Director wished to discuss the Applicant's termination package. The Applicant insisted that they discuss how the decision to restructure was arrived at and why her post was abolished. She demanded the financial statements to enable her to properly discuss these issues, which she said must be discussed prior to negotiation of a package.
10. The Managing Director explained at the meeting that the decision to abolish the Applicant's post had been taken by the Board of Directors of the Respondent and management intended to implement the Board's decision. If the Applicant was not prepared to negotiate a package, the meeting should end.
11. The meeting ended without any proper consultations. Three days later on 3rd December 2003, the Applicant was notified by letter that her services were terminated "as of 30th November 2003." She was informed that she would be paid her statutory benefits.
12. The Applicant reported a dispute to the Conciliation, Mediation and Arbitration Commission. The dispute could not be resolved through conciliation. The Applicant then applied to the Industrial Court, claiming reinstatement alternatively compensation for unfair dismissal.

A further claim in respect of pension contributions fell away because it was settled in the meantime.

13. The Applicant testified in support of her claim. She said that she had been unfairly dismissed because her position as Personnel Officer was not truly redundant. It was abolished to get rid of her because she has instituted legal proceedings against the Respondent. She complained that she had not been consulted on the restructuring and abolishment of her post, nor on the decision to terminate her services. No attempt was made to consult with her regarding the reason for making her post redundant, nor on ways and means to avoid her retrenchment.

14. The Respondent called Paul Mfuya Thabede to testify on its behalf. He was the Managing Director of SEDCO at the date of termination of the Applicant's services, but he has since retired. Mr. Thabede said the Board of SEDCO took a decision to restructure the company by abolishing the post of Personnel Officer as from 30 November 2003. According to Mr. Thabede this was a Board decision taken without any contribution by management. He said he had no knowledge before the Board meeting that the issue would be discussed. It was not included in the meeting agenda. He never raised the matter with the Board prior to the meeting, nor did he have any input at the meeting. The Board took a decision to restructure and abolish the post of Personnel Officer with effect from 30 November 2003. He was asked to recuse himself when the decision was taken. He had no idea what prompted such a decision. He was only instructed to implement the decision. It was left to him as Managing Director to re-distribute the duties and functions of the Personnel Officer as an "implementation strategy."

15. Mr. Thabede testified that before this decision of the Board, the position of Personnel Officer was required at SEDCO, and he had never considered nor suggested that the position was surplus to requirements.
16. Mr. Thabede said he duly implemented the Board decision. He wrote to the Applicant informing her of the decision. He looked at the organization structure to see if the Applicant could be accommodated elsewhere. He said he intended to discuss available options with the Applicant when they met for consultation, but he conceded that he never conveyed this to the Applicant.
17. Mr. Thabede agreed that the Applicant had specifically requested in writing to discuss ways and means of avoiding the loss of her employment. He said there was however nothing to consider or discuss except the package. Everything else had been dealt with in the correspondence between the parties.
18. He denied the allegation of victimization and affirmed that the Applicant had a right to report a dispute to the Labour Commissioner. He said that if SEDCO wanted to get rid of the Applicant specifically, she should have been dismissed after a previous disciplinary hearing when this was recommended by the chairperson. Instead it was decided to apply a lesser sanction by stopping her increment. He said the reason to abolish her post was simply to cut down on costs. He confirmed that SEDCO was not in any financial difficulty warranting cost-cutting measures, but nevertheless there was a financial benefit to SEDCO because Applicant's duties were redeployed to other employees and her salary no longer had to be paid. The legal functions of Applicant's post were shifted to the Legal Department,

including grievance and disciplinary matters. Administrative and training functions were transferred to the Finance department.

19. In his letter of 22 November 2003 to the Applicant, the Managing Director referred to the new structure as creating a new position of Chief of Operations to assist the Managing Director. In his evidence, he explained that this new position had been created prior to the Board decision to abolish the Applicant's post. It transpired from the evidence of Thabede and the other witness called by the Respondent that the new post of Chief of Operations has in fact never been filled. It is clear that the creation of this new post had nothing to do with the decision to abolish the Applicant's position.
20. The Respondent also called Jabulani Norman Dlamini, its current Legal Affairs Manager and Secretary to the Board. Mr. Dlamini confirmed that certain personnel functions were transferred to his department after the Applicant's post was abolished. At the time he was Legal Officer. His position was then upgraded to Legal Affairs Manager. He was given a salary increment, which he complains was insufficient to compensate him for the extra duties and responsibilities he took over from the Applicant. The court was not told the extent of the salary increment. Mr. Dlamini confirmed that there is still no Personnel Officer post at SEDCO, and the duties remain split between the Legal and Finance Departments.
21. Under cross-examination, Mr. Dlamini gave a version regarding the board decision to abolish Applicant's post that differs in material respects from the version given by Mr. Thabede. He stated inter alia that:

- 21.1 The issue of restructuring would have been included in the board agenda;
- 21.2 The Managing Director raised the issue before the Board, and proposed that the personnel functions be split between Legal and Finance departments;
- 21.3 The Managing Director motivated the issue and gave reasons for abolishing the Applicant's post;
- 21.4 The Board directed that the Applicant be consulted since she was affected by the decision;
- 21.5 He could not recall the board giving any time frame;
- 21.6 The Managing Director was present throughout the Board meeting.
22. Asked by the court whether he was reconstructing what happened at this board meeting, he stated that this was his personal recollection of the events.
23. The witness said that minutes of the Board meeting were available. He was given the opportunity to bring them to court. On the matter resuming, he rather lamely claimed that the minutes could not be located. He also tried to minimize the effect of his evidence by stating in re-examination that he had attended many Board meetings and could not remember what transpired at all of them.
24. A further issue which arose on the evidence was the employment of

one Jabu Dlamini in the Finance department after Applicant's retrenchment. The court is satisfied that this young graduate was given a temporary job to give her exposure to accounting work in the commercial world, and she was not employed to take over the Applicant's job.

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.

26. The decision to retrench must be reasonable, made in good faith and there must be a commercial rationale for the retrenchment

Rycroft & Jordan: A Guide to SA Labour Law (2ND Ed) p. 238.

27. The Applicant was the only employee affected by the restructuring of the Respondent. In fact the "restructuring" was nothing more than the abolishment of the Applicant's post. In these circumstances, the court must closely scrutinize the circumstances and reasons for the restructuring to ensure that the decision to abolish the post was genuine and not a ruse to get rid of the Applicant.

28. On the version of Mr. Thabede the decision to abolish the Applicant's post was made by the Board of Directors, without any prior evaluation of the post or the impact of its abolishment. Management

was not consulted. The issue was not on the board's agenda, and the Managing Director was asked to recuse himself when the matter was discussed. On this version, the decision was made by a board of non-executive directors in a perverse and entirely arbitrary manner, unprompted by any operational need of the organization.

29. We consider Mr. Thabede's version to be highly improbable. SEDCO is a category A public enterprise wholly owned by the Government and governed by the provisions of the Public Enterprises (Control and Monitoring) Act, 1989. We do not believe that the Board would randomly conceive and implement a significant change in the organizational structure without the prior involvement and approval of at least the Managing Director and the Finance Manager. We do not believe such an important issue would be omitted from the agenda and the Managing Director excluded from the discussions.
30. We prefer the version of the Secretary to the Board, Mr. Dlamini. We find it probable that the abolishment of the post was conceived and engineered by Mr. Thabede, possibly in collaboration with the chairman of the Board. We accept Mr. Dlamini's version that Mr. Tsabede introduced and motivated the issue before the Board.
31. We believe that Mr. Thabede misled the court and tried to conceal the significant role he played in the abolishment of Applicant's post. The only reasonable inference to be drawn from this deception is that Mr. Thabede terminated the Applicant's services in bad faith, and he now seeks to evade responsibility and the need to justify his actions by creating the fiction of a Board decision taken without his participation.
32. It is also difficult to believe that any commercial rationale lay behind

the decision to abolish the post of Personnel Officer. SEDCO employs in excess of 50 personnel. The personnel department was established under the management of a Personnel Officer many years ago in response to the need for specialized handling and coordination of human resources and industrial relations functions. The Applicant's job description reveals important duties and functions vital to the efficient operation of the Respondent and the welfare and development of its employees. It is an extraordinary decision to abolish so important a post in order to save the cost of a salary, particularly where the company is not in financial difficulties and the salary is not particularly onerous. No other cost-saving measures were investigated or implemented. Shortly before the decision was taken to allegedly save costs by abolishing the Applicant's post, the Respondent created a new post of Chief of Operations which was so unnecessary that four years later the post has still not been filled.

33. It is impossible to avoid the conclusion that the termination of the Applicant's services was the purpose and object of the abolishment of her post, not some arbitrary and unnecessary cost saving.

34. The bad faith of the Managing Director is illustrated by his manifest failure to consider options to avoid retrenching the Applicant an employee of 25 years standing. As appears from his letter to the Applicant dated 31 October 2003, he assumed that the abolishment of the Applicant's post led inevitably to the termination of her services. In response to the Applicant's express request to consult on ways and means to avoid her retrenchment, he declined to discuss anything except the termination package. His attitude throughout was that termination was a fait accompli. We do not believe his evidence that he intended to consult with the Applicant on alternatives to her

retrenchment. When he had the opportunity to do so, he was only willing to discuss her package.

35. If the decision had not been taken from the outset to terminate the services of the Applicant on 30th November 2007, it is incomprehensible why the Managing Director found it necessary to backdate the termination to 30th November 2003. Thabede was so intent on getting rid of the Applicant by the 30th November 2003 he even arranged the 'consultation' meeting on a Sunday.

36. In terms of section 36 (j) of the Employment Act, 1980 it is fair for an employer to terminate the services of an employee because the employee is redundant. In the view of the court, the Applicant was not redundant. The duties and functions of her office were vital to the efficient operation of the Respondent's business. There is no evidence of any need to save costs or improve operations by abolishing the Applicant's post. In our view the Applicant's employment was not terminated due to any of the causes contained in the definition of "redundant employee" under section 2 of the Act. The abolishment of her post was a sham, deliberately conceived in order to single out the Applicant for dismissal. We find that the termination of the Applicant's services was substantively unfair.

37. Mr. Jele for the Applicant has submitted that the retrenchment of the Applicant was also procedurally unfair, because:

37.1 She was not consulted nor given reasons for the restructuring which gave rise to the abolishment of her position.

37.2 She was denied access to the information she requested for purposes of meaningful consultation.

37.3 She was given insufficient notice of her intended retrenchment.

38. An employer is required to consult with an affected employee as soon as it contemplates a retrenchment for reasons of redundancy, and before it takes the decision to terminate an employee's services.

Cheadle : Retrenchment : The New Guidelines (1985) 6 ILJ 127 at 135;

SNACS v Swaziland Government (I.C. Case No. 83/2007);

See also **ILO Recommendation 166 and section 40 of the Employment Act 1980**

39. This requirement of our labour law does not mean that the employer must always consult with an employee regarding the operational decision which triggers the possibility of a retrenchment, but the employee is at least entitled to know the reason for the operational decision. Otherwise the employee is unable to judge whether the operational decision is reasonable and bona fide.

40. In the present matter, the Respondent gave the Applicant reasons for the decision to abolish her post but those reasons were so commercially irrational that it is not surprising that the Applicant kept on demanding a more substantial explanation. The procedural

unfairness arises however in the fact that the Respondent decided to terminate the Applicant's services on 30th November 2003 before it had consulted with her. Notice of termination of services on grounds of redundancy was given without prior warning. In the circumstances, inviting the Applicant to a consultation meeting was no more than a procedural sham. The Applicant should have been consulted on possible measures to avoid retrenchment or minimize the impact, and the timing of the retrenchment, before the decision to terminate her services was taken. Since the Respondent regarded her termination as inevitable, the only issue up for discussion was the termination package, and consultation on other issues was precluded. The Applicant was denied her right to adequate, bona fide prior consultation.

41. Considering the ad hoc and arbitrary manner in which the Applicant's post was abolished it is not surprising that no new organogram was made available to the Applicant. We doubt that the Managing Director had planned any further than deleting the Applicant's post from the structure and reshuffling her duties. Likewise, no purpose could be served in producing financial statements, since the decision was not prompted by any financial need or difficulty.
42. We find that the Applicant's retrenchment was substantially and procedurally unfair.
43. 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 had reported a

dispute against the Respondent, as she was entitled to do in terms of Part V111 of the Industrial Relations Act 2000. The Managing Director clearly resented the Applicant's apparent ingratitude for not accepting the stoppage of her annual increment as a lesser penalty to the dismissal recommended at her disciplinary enquiry and that she was taking her employer to court – we do not believe Mr. Thabede's protestations to the contrary. We find that the retrenchment of the Applicant was an automatically unfair dismissal as defined in sub paragraph d (i) of the definition under section 2 of the Industrial Relations Act 2000.

44. The court has given careful consideration to the question whether we should order the reinstatement of the Applicant. In terms of section 16 (3) of the Act, we must first consider the possibility of reinstatement. We have found that the abolishment of the post of Personnel Officer and the re-distribution of its duties and functions had no commercial rationale and was engineered solely as an exercise to get rid of the Applicant. In these circumstances, there is no reason why the status quo ante the retrenchment should not be restored. The Applicant wishes to be reinstated. The operations of the Respondent will in our view benefit from having a Personnel Officer to supervise its human resources and industrial relations functions. The Managing Director responsible for victimizing the Applicant is no longer in the employ of the Respondent. The Applicant is still young and has many years of service to offer the Respondent. She has not obtained alternative employment. We believe that reinstatement is a reasonably practicable and appropriate remedy in all the circumstances.

45. An order for reinstatement means that the employee is treated in all respects as if her services had never been terminated, and she is

entitled to payment of remuneration from the date of termination to the date of reinstatement. We consider that it would be unduly harsh to require the Respondent to pay the Applicant the full arrear remuneration when it did not benefit from her services during this lengthy period, particularly because the Respondent cannot be held responsible for the delay in the case coming to trial. We consider that it would be fair and equitable for the Respondent to remunerate the Applicant for a period of 30 months from 1st December 2003 to 1st May 2006.

46. The Applicant must refund the statutory terminal benefits paid to her by way of notice, additional notice and severance allowance. This amount is to be set off against the remuneration payable to her. Regarding her pension, the Respondent is required to ensure that she receives full credit from the employer's contributions from the date she became a member of the pension fund to the date of her reinstatement. The Applicant may retain the amount paid to her upon her retrenchment in respect of her own contributions to the pension fund plus interest, and she will only be liable to re-commence her contributions from the date of her reinstatement.
47. The court makes the following order:

- (a) **The Respondent is ordered to reinstate the Applicant to her position as Personnel Officer with effect from 1st December 2003, with full restoration of seniority, length of service and benefits.**

- (b) **The Respondent is ordered to pay to the Applicant the sum of E69,347.25 in respect of the balance of arrear remuneration after refund of terminal benefits.**

- (c) **The Respondent is ordered to pay to its Pension Fund for the credit of the Applicant the employer contributions for the period from 1st December 2003 to the date of reinstatement, and to procure that the Applicant is credited with all employer contributions paid to the Fund on her behalf prior to 1st December 2003 together with accrued interest to date.**

- (d) **The Respondent is ordered to pay the costs of the suit.**

The members agree.

**PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT**