



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 535/06

In the matter between:

JABU MTSETFWA & 3 OTHERS

Applicants

And

YKK SOUTHERN AFRICA (PTY) LTD

Respondent

Neutral citation: *Jabu Mtsetfwa & 3 Others v YKK Southern Africa (Pty) Ltd (Pty) Ltd (535/06 [2012] SZIC 15 (JUNE 21 2012)*

Coram: NKONYANE J,
*(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)*

Heard: **08 JUNE 2012**

Delivered: **21 JUNE 2012**

Summary:

Applicants were dismissed by the Respondent following a retrenchment process. The Respondent failed to observe the requirements of Section 40 of the Employment Act. Respondent also failed to prove before the court that there was a genuine financial reason for the retrenchment. Court finds that the dismissal was therefore substantively and procedurally unfair.

JUDGMENT 21.06.12

- [1] This is an application for determination of an unresolved dispute in terms of the provisions of the Industrial Relations Act, 2000 as amended.
- [2] Two of the Applicants were however unable to prosecute their claims. The court was informed that the two Applicants have since passed on. This is indeed sad news and a serious indictment on the court system that a litigant could die whilst still waiting for his day in court.
- [3] The application on behalf of the 1st and 4th Applicants was accordingly withdrawn. Before the court therefore is 2nd and 3rd Applicants, namely, Theresa Dlamini and Linnea Mordaunt.

- [4] The 2nd Applicant is an adult female Swazi of Mangwaneni area in Mbabane. The 3rd Applicant is an adult female Swazi of Manzini.
- [5] The Respondent is YKK Southern Africa (Pty) Ltd Swaziland Plant, a company duly registered and incorporated in accordance with the laws of Swaziland carrying on manufacturing business at Matsapha Industrial Site.
- [6] Theresa Dlamini stated in the application that she was first employed by the Respondent on 15th September 1989. This was however disputed by the Respondent in its Reply and stated that she was first employed on 27th October 1989. Linnea Mordaunt stated in the application that she was first employed by the Respondent on 01st November 1993. This date was not disputed by the Respondent. The Applicants were in continuous employment by the Respondent until 31st May 2006 when they were terminated on grounds of redundancy. This date of termination is not in dispute.
- [7] The other undisputed evidence is that Theresa Dlamini was earning E4,058.00 per month and Linnea Mordaunt was earning E8,481.00 per month.

[8] In their paragraph 6 the Applicants averred that they were not paid all money that was due and accrued to them during the employment relationship with the Respondent. This was denied by the Respondent in its Reply. In paragraph 8 the Applicants averred that their dismissal by the Respondent was unfair and unreasonable both substantively and procedurally. This was denied by the Respondent. The Applicant stated that their dismissal was unfair and unreasonable for the following reasons:

“8.1 There was no consultation between the Respondent, individual Applicants and their recognized labour union (SMAWU) prior to the alleged retrenchments.

8.2 No notification was made to the Commissioner of Labour as prescribed by the Labour Laws of Swaziland prior to the alleged retrenchments.

8.3 No fair and objective selection criteria was used on the selection of the Applicants for the alleged retrenchments. Further, it is not known to the Applicants nor was it communicated to them which selection criteria would be put in place.

8.4 No audited books of accounts and/or financial statements were tabled to the Applicants and their labour union for

inspection prior to the decision to retrench was made by the Respondents.

8.5 Other people were employed in the positions of some of the Applicants after their alleged retrenchments.

8.6 There was no financial rationale that necessitated the alleged retrenchments as no substantive reason was communicated to the Applicants prior to their alleged retrenchments.

8.7 In totality, the procedure followed by the Respondent in effecting the alleged retrenchments fell far too short of the legally required procedure set out by Section 40 of the Employment Act 1980 as amended.”

[9] The evidence of Theresa Dlamini before the court revealed that she was holding the position of Production Co-ordinator and Supervisor at the time of her dismissal. Her job description involved receiving e-mails, querying orders and making replies thereto and also following up of late orders. She had worked for the Respondent for sixteen years at the time of her dismissal. She had a clean disciplinary record. She was present during the staff meeting held on 25th May 2005 when they were told by Lester Davies that the Respondent was experiencing financial problems. She denied that there were any financial problems as the operations were normal. She said

things were operating as normal because they were working the usual three shifts.

[10] She said there were times when the company experienced financial problems, and that during those difficult times the shifts would be reduced. In May 2005 when they were dismissed, the normal three shifts were operating. She was the Supervisor for three Departments and she knew what was happening in each of the Departments. She also denied that she was highly paid. She made an example of a certain employee by the name of Fred Leibrandt who is a Supervisor and is paid more than her. She said Fred Leibrandt is still employed by the Respondent as the Mechanics Supervisor. She said she did not know or think of herself as one of those employees earmarked for retrenchment. She said they were not shown any audited financial statement.

[11] In 2001 and 2002 she received an award as the best employee for the Respondent in Southern Africa. She was also responsible for setting up other Departments in the company, for example, the Lab Department where zips were checked. She was the first one to work in that Department and trained other employees who are still working there even today. She was never individually consulted about the retrenchment. She said on 31st May 2005 at about 12:20 pm she was called by the Human Resources Manager

to the Boardroom. She was told there that her days with the Respondent were over. She was shown a document with details of her package. She was shocked by this and asked for some time to consult.

[12] She told the court that if she was consulted individually, she would have suggested that she returns to the factory floor from where she was promoted in November 1999 and was being paid fortnightly.

[13] She told the court that she thinks she was dismissed for personal reasons and jealousy by Lester Davies. She said Lester Davies was jealous because she was the best performer and received awards.

[14] She has not been lucky enough to secure employment since her dismissal in May 2005. She is a single parent and has five children. Her last born child is able to go to school on account of the Free Primary Education Programme that has been recently introduced by the Swaziland Government. She is requesting the court to award her twelve months' compensation.

[15] During cross examination she insisted that Lester Davies was driven by personal reasons and jealousy to have her retrenched. She said it did not add up that she was getting awards as the best performer in the Southern Africa Region of the Respondent, yet she was retrenched. She said it was her first time to see the letter that the Respondent wrote to the Labour Commissioner informing that office of the intended retrenchment. She said she did not know if anyone else was employed in her position. She also disputed the evidence that the Respondent was making losses. She said she was never told individually that she would be retrenched. She said she was not a member of the union at work because she was ineligible because of her position as the Supervisor. She said there was no staff association.

[16] She told the court that during the meeting on 25th May 2005 they were not told of the positions to be affected by the retrenchment. She said after this meeting she was never called to any other meeting until 31st May 2005 when she was told that she had been retrenched.

[17] The 3rd Applicant, Linnea Mordaunt's evidence was as follows:- she was employed by the Respondent for eleven years. She was called to the Boardroom on 31st May 2005 and told that her service had been terminated

because of the retrenchment. Her salary was E8,481.00 per month. She had a clean employment record at the time of her dismissal. She said she was given a cheque of E18,000.00 after deduction from an amount of E24,138.00. She did not take the cheque immediately as she wanted to first consult on the matter. She said it was difficult for her to accept the cheque as she had loans to settle outside. She said she felt humiliated by the way things unfolded on that day. She went to her office to empty her drawer. When she tried to email her colleagues she found that she was no longer on the system.

[18] She said she was never individually notified and consulted about the retrenchment. She said prior to 31st May 2005, she had never been told that her position was redundant. She said soon after their retrenchment, some employees were promoted from fortnightly pay to monthly pay, so she does not accept the reason suggested that the Respondent underwent the retrenchment exercise because of financial constraints.

[19] She said after they had left some employees were promoted. She said employees were Thuli Dlamini and Edwin Dlamini.

[20] On 10th April 2006 she got employment at Eteteni Filling Station in Matsapha. She was earning E5 000:00 per month, E3 000:00 less than what

she used to earn at the Respondent's place. She is presently not employed. She said she never saw the letter of notification addressed to the Labour Commissioner.

[21] During cross examination she confirmed her evidence that after their retrenchment some factory staff members were promoted from fortnightly to monthly paid staff. She said she does not know their job titles. She said she was never told that she was going to be retrenched. She said they were twenty one in the meeting held on 25th May 2005 and they were never individually consulted. She said there was no time frame stated as to when the employees could ask more questions from management if they had any. She agreed that she was the highly paid employee in her Department.

[22] The Respondent led only one witness before the court being RW1, Simon Magagula. He told the court in his evidence in chief that he is employed by the Respondent as the Human Resources Manager and has been with the Respondent for thirteen years. He said in 2005 the Respondent experienced a downturn in the world markets and the orders were dwindling. He said the Respondent changed shifts as per the demand in the markets. He said he was present during the meeting that was held on 25th May 2005.

- [23] He said the meeting was held to allow management to report back to the staff on what was happening in the company and in the international markets. He said they proposed to reduce staff to try to keep the company sustainable. He said the head count was too high. He said they were not sure as to how many people would be affected. He said the criterion used to effect the retrenchments was cost to company.
- [24] He said Linnea Mordaunt was the highest paid Supervisor. He said Theresa Dlamini was the Co-ordinator between Sales and Production. He said the company felt that it could do away with her position and let Sales to report directly to Production.
- [25] RW1 also referred to Exhibit “B2” which he identified as the Profit and Loss Statement of the Respondent which he said he extracted from the intranet. He said the Applicants were not part of the bargaining unit. He said the Applicants were not replaced.
- [26] During cross examination he said the Respondent’s financial year started from 01st April to 31st March of the following year. He admitted that there were no audited statements before the court. RW1 also admitted that there was no financial statement for 2004. He however said the financial statement for 2004/2005 was available. He denied that he knew that

Theresa was going to be affected by the retrenchment because there were many other Co-ordinators. He conceded that the meeting held on 31st May 2005 was not a consultation meeting with the Applicants.

[27] RW1 also admitted that they did not consult the Applicants after the meeting that was held on 25th May 2005. He also said the financial extract Exhibit “B2” was available in 2005 but was not shown to the Applicants. RW1 said there was a change of shift in 2005.

[28] During re-examination RW1 said the Applicants did have an opportunity to make suggestions during the meeting held on 25th May 2005.

[29] **ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE**

The Applicants’ case before the court is that they were unfairly and unreasonably dismissed by the Respondent both substantively and procedurally. Substantively, the enquiry that the court is being called upon to make is whether or not there was a substantive reason for the Respondent to retrench the Applicants or, alternatively, was there any tangible reason

which was the basis for the retrenchment by the Respondent. Procedurally, the enquiry is, if there was a tangible reason for the retrenchment, was the retrenchment procedure followed by the Respondent.

[30] The burden of proof that there was a genuine tangible reason for the retrenchment and that the procedure thereof was followed is on the Respondent to discharge on a balance of probabilities. (**See : Section 42 of the Employment Act No. 5 of 1980 as amended**)

[31] Section 36 of the Employment Act No. 5 of 1980 as amended provides for fair reasons for the termination of an employee's services. **Section 36 (1)** provides that it is a fair reason to terminate an employee's services on grounds of redundancy.

[32] Where an employer intends to terminate the services of five or more employees it must follow the provisions of **Section 40 (2) of the Employment Act**. The evidence before the court revealed that there were five employees that the Respondent intended to retrench. The Respondent was therefore expected to follow the provisions of **Section 40(2)** in this case.

[33] **Section 40(2)** provides that:

“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 a month’s 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 be redundant.
- (b) The occupations and remuneration 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.”

[34] The wording of the subsection is in the imperative. It says that ‘the employer **“shall”** include the following information ...’ It is therefore not optional on the part of the employer to produce the latest financial

statements and audited accounts. In the present case the Respondent provided a letter from the auditors. Even this letter relates to financial statements for the year ended 31st December 2003. The provision of the latest audited accounts of the company is important in a case where the Applicants have been terminated on grounds of redundancy because they provide proof that the company was indeed not financially stable, hence the need to retrench.

[35] The Respondent having failed to provide the latest financial statement and audited accounts to the Applicants and to the court, it cannot be said that the Respondent was able to prove on a balance of probabilities that there was a genuine financial reason for the retrenchment.

[36] During the meeting held on 25th May 2005, the Respondent already knew which departments would be affected by the intended retrenchment. This is evident from the letter that the Respondent wrote to the Labour Commissioner. The Respondent however did not disclose this information to the Applicants during that meeting. The Applicants were not members of a trade union, so there was a need for the Applicants to be consulted individually.

[37] The Respondent also said it used the cost to company criterion to effect the retrenchments. This however not entirely correct as that criterion was not followed in the case of Theresa Dlamini as her evidence revealed that she was not highly paid. RW1 told the court during cross examination that there were many Co-ordinators. He failed to explain how Theresa Dlamini was targeted among the other Co-ordinators. There was no evidence that she was the highest paid of all the Co-ordinators.

[38] RW1 also said Theresa Dlamini was retrenched because her position was superfluous and decided to do away with her position and let the Sales Department report directly to the Production Department.

[39] In the end it was not clear as to what criterion was used to retrench Theresa Dlamini, was it the cost to company or that her position was found to be superfluous. This conundrum goes to prove that there was no genuine commercial rationale for the retrenchment.

[40] The Respondent having failed to prove on a balance of probabilities that there was a genuine commercial rationale for the retrenchment, and the Respondent failed to follow retrenchment procedures, the court will come to the conclusion that the dismissal of the Applicants on 31st May 2005 was substantively and procedurally unfair.

[41] **RELIEF**

Both Applicants are not presently employed. Linnea Mordaunt once had the opportunity to work at Eteteni Filling Station after her retrenchment. Theresa Dlamini had worked for the Respondent for sixteen years with a clean record at the time of her dismissal. She had also received awards as a top performer. Linnea Mordaunt had served the Respondent for thirteen years also with a clean employment record. The Applicants were never individually consulted before their retrenchment on 31st May 2005. They were only told that they were selected for retrenchment on the very same day that they were retrenched. This was clearly unfair and unjust. The Applicants never had the time to adjust to their new status of being jobless. They were clearly thoroughly humiliated and unfairly treated by the Respondent.

[42] Theresa Dlamini told the court that she was a top performer and received awards for being the best employee in the Southern Africa Region. All this was not appreciated by the Respondent which decided to retrench her without notice. Her evidence that she was responsible for setting up the Lab Department and also trained other employees who are still employed

by the Respondent was not disputed. She is a single parent and has five children.

[43] Taking into account all the personal circumstances of the Applicants the court will order the Respondent to pay to the applicants the following amounts:-

a) **Theresa Dlamini** **E4,058.00 x 12**
= **E48,696.00**

b) **Linnea Mordaunt** **E8,481.00 x 12**
= **E101,772.00**

[44] There was no prayer for costs in the Applicants' application. There was also no application before the court to amend the Applicants' application to add a prayer for costs. The court will accordingly make no order as to costs.

The members agree.

NKONYANE J

**For Applicants : Mr. N. D. Jele
(Robinson Bertram)**

**For Respondents : Mr. Musa Sibandze
(Musa M. Sibandze Attorneys)**