



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

CASE NO. 15/2011

AMOS MABUZA

APPLICANT

And

SWAZI PLASTIC INDUSTRIES

RESPONDENT

Neutral citation: Amos Mabuza V Swazi Plastic Industries
(15/2011) [2013] SZIC 33 (29th November 2013)

CORAM: D. MAZIBUKO

(Sitting with A. Nkambule & M.T.E. Mtetwa)
(Members of the Court)

Heard : 12th August 2013

Delivered : 29th November 2013

Summary: *Labour Law: Employer changes terms of employment, change reduces employee's status and salary. Employee applies to Labour Commissioner for restoration of status quo- in terms of Section 26 (2) and (3) Employment Act No. 5/1980.*

The 14 days notification in Section 26 (2) is peremptory. Labour Commissioner must be approached within 14 days of change of terms of employment.

1. On the 1st March 1986 , the Applicant Mr Mabuza, was employed by the Respondent as an Extrusion Supervisor. The contract of employment is attached to the Applicant's affidavit and is marked annexure AM 1. The contract of employment has undergone certain changes which are dealt with below. The Respondent is Swazi Plastic Industries, an incorporated company carrying on business in Matsapha, Swaziland.
2. About the year 1999, the Applicant became ill and had to undergo medical treatment. As a result thereof, the Applicant was absent from work on intermittent days estimated at 22 (Twenty two) in the calendar year 2009. On certain days he reported late for work. The Applicant's absence and late arrival at work caused tension between himself and the Respondent. According to the Respondent: production in the Extrusion department was severely disturbed due to the absence of the supervisor (Applicant) . The disturbance in the extrusion department resulted in a loss in production.
3. On the 5th October 2009, the Respondent demoted the Applicant from Extrusion Supervisor to Extrusion Operator. The Applicant began working as Extrusion Operator in November 2009.

The demotion was communicated to the Applicant by letter which is attached to the Applicant's founding affidavit marked annexure AM 2. Annexure AM 2 reads as follows;

"Our Ref: TLOOMz

*Mr Amos Mabuza
Matsapha*

Re Extrusion Supervisor

Dear Amos

Management regretfully has made a decision to demote you from Extrusion Supervisor to Extrusion Operator. This is solely due to continuous absenteeism, for medical or any other reasons. You must understand that the Extrusion Department cannot function if its supervisor is absent for days at a time. As a matter of fact you have been absent for a total of twenty two days for the calendar year and only presented doctors notes to cover thirteen days. Furthermore, due to being late 37 times to date, this is equivalent to five days lost time.

Under normal circumstance your absenteeism would lead to summary dismissal; however, we have taken a lenient approach solely because for sometime you have been struggling with your health and not been well at all. We expect that you give our newly appointed supervisor,

Charles Mhlanga, your full support and co-operation and conduct yourself in a subordinate manner.

Yours faithfully

S.BISSETT

FACTORY MANAGER”

4. On the 19th November 2009, the Applicant was informed in writing that his salary would be reduced as a result of the demotion. The reduced salary commenced December 2009. The letter informing the Applicant about the salary reduction is marked annexure AM 4. Annexure AM 4 reads as follows;

“19th November 2009

Mr Amos Mabuza

Dear Amos,

YOUR DEMOTION TO EXTRUSION OPERATOR

Further to your demotion to Extrusion Operator (from Extrusion Supervisor) as agreed with you on the 5th October 2009, we confirm that your rate will be decreased to 12-40 per hour, effective from the new pay month starting on the 26 November 2009.

The decreasing of your rate should be done with effect from the date of change of your position,

however management has decided to make this effective from the start of the next pay month. Accordingly there will be no change of rate in your November 09 pay, but your December 09 pay will be at the new rate.

Yours faithfully

*SG BISSETT
FACTORY MANAGER*

cc: Mr M. Zbinden – Managing Director

*Agreed – (signed)
(A.Mabuza)*

Date 19.11.09

5. On the 11th January 2010, the Applicant complained in writing to the Respondent about the demotion and subsequent reduction in salary. In the Applicant's view the demotion had been carried out unilaterally and unfairly. The Applicant did not get a response to his complaint. The Applicant's complaint is marked annexure AM 5.

6. On the 25th March 2010, the Applicant filed a complaint with the Labour Commissioner about the demotion and salary reduction. The Applicant further complained about ill-treatment by the Respondent's Managing Director. According to the Applicant he had been insulted as well as assaulted by the said Managing Director. The Applicant stated that he had filed his complaint in terms of section 26 (2) of The Employment Act No. 5/1980. The Complaint is marked annexure AM 6.

7. On the 14th September 2010, the Applicant reported the same matter as a dispute with the Conciliation, Mediation and Arbitration Commission (CMAC). The parties failed to resolve the dispute at CMAC. Consequently CMAC issued a certificate on the 14th September 2010, declaring the dispute – unresolved. The certificate is marked annexure AM 7.

8. The Labour Commissioner delayed in attending to the Applicant's complaint aforementioned (annexure AM 6). About the 7th October 2010, the Applicant wrote to the Labour Commissioner a reminder concerning the said complaint. Thereafter, the Labour Commissioner convened a meeting of the parties on the 20th October 2010. The matter was deliberated upon as scheduled. Shortly thereafter, the Labour Commissioner issued his opinion as requested of him in terms of section 26 (3) of The Employment Act. The Commissioner decided in favour of the Applicant. The effect of the Labour Commissioner's opinion (or ruling) has the effect of reversing the decision which the Respondent took concerning the Applicant, in particular the demotion and salary reduction. The Labour Commissioner's opinion (ruling) is marked annexure 10.

9. The Respondent has alleged that they filed a notice requesting a review of the Labour Commissioner's opinion. It is however not clear to the Court as to whether the request for a review reached the Labour Commissioner and if so, what became of it.

10. The Applicant is still employed by the Respondent and works as an Extrusion Operator at the reduced salary. The Applicant has filed an application in Court for relief as follows;

- “1. An order directing the Respondent to comply with the Department of Labour’s Opinion [or] report issued by the Commissioner of Labour in terms of Section 26 of the Employment Act, 1980.*
- 2. Payment of the underpayment of E1,731.00 (One Thousand Seven Hundred and Thirty One Emalangen) per month to the date the matter is settled, from December , 2009 to date .*
- 3. That the purported unilateral variation of Applicant’s post from that of Extrusion Supervisor to Extrusion Operator by the Respondent be and is hereby declared unlawful and unfair Labour practices and therefore set aside, as per the Commissioner of Labour’s report.*
- 4. That the Respondent be ordered to pay costs of suit.*
- 5. Further and alternative relief .”*

11. The application is opposed. The Respondent has raised points of law in its answering affidavit and has further pleaded over on the merits. The issue that the Respondent has emphasized in the 3 (three) points of law aforementioned is that: the Labour Commissioner acted irregularly and ultra vires when he issued his opinion (ruling) in terms of section 26 (3) of The Employment Act.

12. The Respondent's first points in limine reads as follows:-

“The changes in Applicant’s terms of employment were not terms of employment either contained in Section 22 Form in terms of [or]as contemplated by Section 26 [1] Applicant [sic] an employee who is required to have a Section 22 Form accordingly the relief under section 26 of the Employment Act is not available to the Applicant and Applicant may only take advantage of the dispute resolute procedures under CMAC. Even Applicant has never alleged that these terms were contained in a Section 22 Form”

(Record Page 32)

The errors in the manner the Respondent has drafted this item of defence are noted. However the Respondent's thinking can still be deciphered despite the numerous errors. The Respondent's argument is that the demotion and salary reduction is not a change in the terms of employment that are provided for in Section 22 or as contemplated in section 26 (1) of The Employment Act.

12.1 The 1st point raised by the Respondent is that the Commissioner's opinion (ruling) is irregular for failing to comply with section 26 (1) of The Employment Act. Section 26 (1), (2), (3) and (4) reads as follows;

(1) Where the terms of employment specified in the copy of the form in the Second Schedule given to the employee under section 22 are changed, the employer shall notify the employee in writing specifying the changes which are being made and subject to the following subsections, the changed terms set out in the notification shall be deemed to be effective and to be part of the terms of service of that employee.

(2) Where, in the employee's opinion, the changes notified to him under subsection (1) would result in less favourable terms and conditions of employment than those previously enjoyed by him, the employee may, within fourteen days of such notification, request his employer, in writing, (sending a copy of the request to the Labour Commissioner), to submit to the Labour Commissioner a copy of the form given to him, under Section 22, together with the notification provided under subsection (1) and the employer shall comply with the request within three days of it being received by him.

(3) On receipt of the copy of the documents sent to him under subsection (2), the Labour Commissioner shall examine the changes in the terms of employment contained in the notification.

Where, in his opinion, the changes would result in less favourable terms and conditions of employment than those enjoyed by the employee in question prior to the changes set out in the notification, The Labour Commissioner shall, within fourteen days of the receipt of the notification, inform the employer in writing of this opinion and the notification given to the employee under subsection (1) shall be void and of no effect.

(4) Any person dissatisfied with any decision made by the Labour Commissioner under subsection (3) may apply in writing for a review to the Labour Commissioner, who using the powers accorded to him under Part II, shall endeavor to settle the matter. Where he is unable to do so within fourteen days of the receipt of the application being made to him he shall refer the matter to the Industrial Court which may make an order.”

12.2 In terms of Section 22 (1) and (2) of The Employment Act, it is mandatory for the Respondent, as employer, to provide the Applicant, as employee with written particulars of employment. The Applicant did receive from the Respondent written particulars of employment when he began work and these are contained in annexure AM 1. The Applicant’s complaint is that the demotion amounted to an adverse change in the written particulars of employment aforementioned.

12.3 The Applicant filed a complaint with the Labour Commissioner in terms of annexure AM6, that he was employed as Extrusion Supervisor, and was demoted to Extrusion Operator. Upon demotion he was required to report to the new Extrusion Supervisor (Mr Charles Mhlanga) to whom he (Applicant) has since become subordinate.

12.4 The Applicant's further complaint is that the demotion resulted in a subsequent reduction in his salary. Before the demotion his salary was E20.89 (Twenty Emalangi Eighty Nine cents) per hour. After the demotion that salary was reduced to E12.49 (Twelve Emalangi Forty Nine cents) per hour.

13. In response to this argument, the Applicant referred the Court to the employment contract (annexure AM1). The Applicant highlighted paragraph 7 therein as being particularly relevant and it reads thus:

“7. Short, description of Employee's work:

*SUPERVISOR EXTRUSION AND ANY OTHER DUTIES WITHIN
REASON FOR OR ON BEHALF OF THE COMPANY”*

(Record Page 9).

14. The Respondent's counsel (Mr M. Sibandze) thereupon informed the Court that he has taken a second look at annexure AM 1, and has since realized that the Respondent's first point in limine has been erroneously filed.

Mr Sibandze proceeded to withdraw this particular aspect of the Respondent's defence. The Court is of the view that Mr Sibandze was correct in withdrawing this defence. There is no doubt that the demotion resulted in an adverse change in the Applicant's position and salary. There is clear and undisputed evidence, that the Applicant was employed as an Extrusion Supervisor and later demoted to Extrusion Operator. The latter position attracted a lesser salary as well as responsibility.

15. The second point raised by the Respondent was that the Applicant filed his complaint (notification) out of time. Therefore, the Labour commissioner had no jurisdiction to intervene in the matter since it was reported contrary to section 26 (2) of The Employment Act.

- 15.1 According to the Respondent, an employee who complains that his terms and conditions of employment have been adversely changed by his employer, must take the necessary action within 14 (fourteen) days from the date he was notified of the change.

- 15.2 Failure by the employee to take the necessary action within the stipulated 14 (fourteen) days, would mean that the employee is time barred, he cannot thereafter exercise his right in terms of section 26 (2) of The Employment Act .

- 15.3 The Applicant was notified on the 5th October 2009, by letter annexure AM 2, that he had been demoted to Extrusion Operator.
- 15.4 The Respondent argued further that the Applicant purported to exercise his rights in terms of section 26 (2) on the 25th March 2010. At that time, the 14(fourteen) days period provided for in section 26 (2) had elapsed.
16. The question before Court is whether the 14 (fourteen) days period provided for in section 26 (2) is mandatory or merely serves as a guideline. The same question arose in the matter of ROYAL SWAZILAND SUGAR CORPORATION VS SWAZILAND AGRICULTURAL AND ALLIED STAFF ASSOCIATION (SIMUNYE BRANCH) SZIC 500/07 AND 501/07 (consolidated) at page 9, His Lordship Dunseith JP (as he then was) held that;
- “The time limit of 14 days is clearly preemptory, since Section 26 (1) provides that failing such request, the changed terms set out in the notification shall be deemed to be effective. This does not mean that all the procedural steps described in section 26 (2) are preemptory.”*
17. This Court , respectfully agrees with the finding of the Court in the matter of the ROYAL SWAZILAND SUGAR CORPORATION, that the 14 (fourteen) days period stipulated in section 26 (2) is preemptory.

This is so, mainly because of the consequences that follow when an aggrieved employee fails to exercise his rights within the given time limit: the changes in the employment contract are deemed effective. The employer will proceed to treat the employment contract as amended.

18. The purpose of the 14 (fourteen) days stipulation, as contained in section 26 (2) is meant to create certainty and predictability in the interpretation and implementation of the employment contract. The employer, the concerned employee and his fellow employees, as well as other interested parties (including the receiver of revenue) must (where necessary), know with certainty the position at work and /or salary of an employee at any given time.
19. The position of an employee at the workplace attracts certain rights and obligations in relation to the employer, the employee and his fellow employees, as well as other interested parties. Also, the salary of the employee could be a significant factor when a contract with that employee, is being negotiated. The employee is entitled to know with certainty the salary he is entitled to, as well as the position he occupies at work, in order to arrange his financial and other obligations. It is therefore imperative that the issue regarding changes in the employment contract should be finalized urgently, for instance within 14 (fourteen) days of the change.
 - 19.1 An employee therefore, who fails to exercise his rights in terms of section 26 (2) of The Employment Act within the stipulated

14 days, is out of time. There is no indication in the Employment Act that the Commissioner has the power to condone late filing of a complaint (notification). It is still a moot point whether the Court can condone late filing, in view of the Court's wide powers provided for in the law, especially section 8 of The Industrial Relations Act No. 1/2000 as amended as well as the Industrial Court Rules.

19.2 Since the period of 14 days which has been provided in Section 26(2), for the employee to exercise his rights is peremptory, it follows therefore that the employer is entitled to raise an objection before the Commissioner, if the employee has filed his request out of time. The Commissioner would have to make a ruling on that objection.

20. It is common cause that the demotion was communicated to the Applicant on the 5th October 2009, by letter - annexure AM 2. This fact is confirmed in paragraph 7 of the Applicant's founding affidavit as follows;

“On or about the 5th October 2010, [2009] after I had been diagnosed with a mystery sickness, it was then that I was demoted from Extrusion Supervisor to Extrusion Operator by the Respondent through a letter by its factory Manager one Mr S. Bisset.”

(Record Page 4)

21. When the Applicant perused annexure AM 2, he noticed that the change which the employer has introduced in the employment contract is prejudicial to his rights . The Applicant concluded that the Respondent has acted unfairly toward him, in the manner he carried out the change. This position is confirmed in paragraph 9 of the Applicant’s affidavit when he stated the following;

“May I hastenly to state that when I was demoted from my former position to my current one, I was never given any hearing nor required to attend any inquiry or even a preliminary inquiry, but that was simply based on my chronic illness”.

(Record Page 4)

The Applicant was therefore entitled, with effect from the 5th October 2009, to challenge the demotion by exercising his rights as provided for under Section 26 (2) of The Employment Act , and within the time limit given.

22. On the 19th October 2009, the Applicant was notified concerning the reduction of his salary when he was served with annexure AM 4. The Applicant was accordingly entitled, with effect from the 19th October 2009, to challenge the salary reduction by exercising his rights as provided for under Section 26 (2) of The Employment Act and within the time limit given.

23. The Applicant communicated to the Labour Commissioner for the 1st time on the 11th January 2010, by way of annexure AM5, concerning the demotion and subsequent salary reduction. At the time the Applicant filed his complaint (notification) in terms of section 26 (2), he was clearly out of time. The 14(fourteen) days - notice period had elapsed ,both in terms of calendar days as well as court days.
24. The Applicant conceded that his notification to the Labour Commissioner (to challenge the demotion and salary reduction) was filed out of time. The Applicant stated as follows in paragraph 15 of his replying affidavit;

“It is further submitted that failure by the Applicant to... notify the Commissioner of Labour of the adverse changes in his employment contract, within the stipulated 14 (fourteen) days is by no means a debarred [debar) to the Commissioner from hearing Applicant’s complaint since these are minor technicalities which do not go to the root cause of the subject matter in which the Court ought not to rely on.”

(Record Page 53)

The Applicant is of the opinion that though the complaint which he filed under Section 26 (2) was out of time, the delay is immaterial since it did not result in prejudice to the Respondent.

25. It appears that the Respondent did not raise before the Commissioner, the issue of late filing of the complaint (notification). Also, the Commissioner did not raise the issue *mero motu*. Consequently, the Commissioner did not deal with the issue of late filing in his opinion (ruling) - which is contained in annexure AM 10.

26. The 14 (fourteen) days period with which an aggrieved employee is permitted to exercise his rights under section 26 (2) is an important factor which should not be overlooked since it has legally binding consequences. In particular, the adverse terms which have been introduced by the employer in the employment contract are deemed to be effective if the employee fails to challenge them under section 26 (2) in time.

27. The Labour Commissioner is empowered and obligated by Section 26 (3) of The Employment Act, to intervene in the matter in the exercise of a quasi-judicial function when he receives a request (complaint) from an aggrieved employee, which has been filed in terms of Section 26 (2). The Applicant, admittedly filed his notification (complaint) under section 26 (2) out of time. The Court has also made a determination to that effect. The matter was therefore not properly before the Commissioner, at the time he heard it, since it had been filed contrary to the time limit stipulated in section 26 (2). The Commissioner was therefore not seized with jurisdiction when he intervened in the matter and subsequently issued his opinion (ruling) in terms of Section 26 (3).

Accordingly, the Commissioner's opinion (ruling), as contained in annexure AM 10 has no legal effect. It does not affect the changes which the Respondent introduced in the employment contract regarding the Applicant's position and salary as contained in annexures AM 2 and AM 4 respectively.

28. The Respondent's second point of law is well taken and it is hereby upheld. As a result, the Commissioner's opinion (ruling) cannot be enforced - since it was made contrary to section 26 (2) of The Employment Act. Accordingly, prayer 1 of the Notice of Motion fails. Prayer 2 has no independent cause of action, instead, it is a remedy that is ancillary to and dependant entirely on the success of either prayer 1 or 3. Prayer 2 is the Applicant's quantification of the amount of money he claims he is entitled to, provided he is successful in his main claim.

29. The third point *in limine* raised by the Respondent reads as follows;

“The Applicant did not send a letter in terms of Section 26 (2) of The Employment Act to the Respondent in particular; Applicant did not send a letter to the Respondent calling upon Respondent to submit the Applicant's Sections 22 Form and the letter containing the changes to Applicant's employment to the Labour Commissioner.

Accordingly the process under Section 26 was never activated as contemplated by section 26 (2).”

30. The nub of the Respondent's point is that: the Applicant failed to strictly comply with the section 26 (2) requirements in the manner he sent or filed his written request (complaint) regarding the changes which had been introduced by the employer, in the employment contract. According to Section 26 (2), the employee should send his written request (complaint) to the employer and serve a copy thereof to the Labour Commissioner.
31. In this case, the Applicant (employee) sent his request (complaint) direct to the Labour Commissioner. It was the Commissioner who forwarded the Applicant's written request (complaint) to the Respondent when he invited the Respondent to a hearing which the Commissioner had scheduled for the 20th October 2010.
32. The Respondent argued that certain procedural steps (other than the time limit aforementioned) have been overlooked by the Applicant when the latter exercised his rights in terms of section 26 (2). According to the Respondent, Section 26 (2) stipulates certain procedural steps which should be followed when an aggrieved employee files his notice (complaint), some of which are listed below:
- 32.1 Upon realizing the adverse changes in his employment contract, the Applicant was required to write to the Respondent requesting the latter to forward to the Commissioner the terms and conditions of employment.

- 32.2. The Applicant was further required to forward to the Commissioner a copy of the written notification which he had sent to the Respondent.
- 32.3 Within 3 (three) days of receipt of the notification issued by the Applicant, the Respondent was required to forward to the Commissioner, the terms and conditions of employment together with the changes thereto, which the employer has introduced in the employment contract. In this case the changes are contained in annexures AM 2 and AM 4.
- 32.4 Upon receipt of the documentation from the Respondent, and after hearing the parties, the Commissioner would then exercise his quasi-judicial function in the matter. In particular, the Commissioner is required to decide on whether or not the new terms of employment are less favourable to the employee (Applicant) than those he previously enjoyed.
33. The purpose of the procedural steps that are listed in Section 26 (2) is clearly understandable.
- 33.1 It gives the employer notice that the employee is dissatisfied with the changes which the employer has introduced in the employment contract. The employer is further notified that the employee is challenging those changes before the Labour Commissioner.

- 33.2 It further gives the employer 3 (three) days, (after receiving the notification from the employee), to consider the changes it has introduced in the employment contract. After due consideration, the employer may be persuaded to withdraw the changes it has made , in which case the status quo ante would be restored.
- 33.3 If the employer is not persuaded to withdraw the changes, the notice further gives the employer time to make the necessary preparation to defend the changes at a hearing before the Labour Commissioner.
- 33.4. The notification further gives the Commissioner an opportunity to receive the necessary documentation relating to the changes, and further listen to arguments from both sides pertaining to the matter before him, in order to make an informed decision.
34. The Applicant failed to strictly follow the procedural steps that are required in section 26 (2). The Applicant did not write to the Respondent requesting written terms and conditions of employment. Instead, the Applicant directed his complaint (annexure AM 6) to the Commissioner. It was the Commissioner who notified the Respondent about annexure AM 6.
35. On the 20th October 2010, when the matter was debated before the Commissioner, the Respondent had already been made aware of the complaint which the Applicant had filed with the Commissioner

(annexure AM 6). The Respondent had been given sufficient time therefore, to prepare for the hearing. Although the Applicant failed to strictly comply with the procedural requirements as contained in section 26 (2), there was no prejudice to the Respondent as a result thereof. The Respondent did not complain about insufficiency of time - either. The Respondent also failed to demonstrate any prejudice which it has or may suffer as a result of this procedural lapse. The Court finds that there was substantial compliance with section 26 (2) , and that compensated for the procedural lapse on the part of the Applicant. For that reason the third point of law raised by the Applicant should fail.

36. About the 25th August 2010 the Applicant referred the matter as a dispute to CMAC for conciliation. An attempt to resolve the dispute through conciliation, failed. The dispute was consequently declared-unresolved. A certificate of unresolved dispute was filed by the Applicant and it is marked annexure AM 7.
37. Although the Respondent's second point *in limine* is successful, that success only affects the decision of the Labour Commissioner, which is contained in annexure AM 10. The Commissioner's decision was an interim relief which was intended and was designed by statute to maintain the status quo until the matter is decided by Court. The matter is now before Court for determination. The success of the Respondent's second point *in limine* does not dispose of the matter, but has the effect of reversing the Commissioner's opinion or ruling (annexure AM 10).

The Applicant still pursues his matter in terms of prayer 3 of the Notice of Motion in that he has prayed that the variation of his employment contract be set aside. The matter should therefore proceed on its merits, as more fully appears on the certificate of unresolved dispute, (annexure AM 7).

38. The Respondent's defence on the merits, is that the demotion of the Applicant and the subsequent salary reduction was done with the consent of the Applicant. In short, the Respondent considers the changes made in the contract of employment, to be a product of an agreement. The Applicant denies that he consented to the adverse changes in his employment contract. There is a dispute of fact which cannot be resolved on the papers before Court, therefore, oral evidence will have to be led. The parties are accordingly referred to oral evidence. The affidavits which have been filed will stand as pleadings. The parties will proceed to file discovery affidavits, arrange a pre-trial conference and take such steps as may be necessary (in accordance with the rules) to bring this matter to trial.

39. Wherefore the Court orders as follows;

39.1 The Respondent's second point *in limine* succeeds.

39.2 Prayer 1 of the Notice of Motion is dismissed.

39.3 The parties are referred to oral evidence on the remainder of the claim.

39.4 Costs are reserved until finalization of the matter.

Members agree

D. MAZIBUKO
INDUSTRIAL COURT- JUDGE

Applicants' Attorney: Mr N. Ginindza
N.E. Ginindza Attorneys

Respondent's Attorney: Mr M. Sibandze
M. Sibandze Attorneys