



IN THE INDUSTRIAL COURT OF SWAZILAND

CASE NO.15/2011

In the matter between:-

AMOS MABUZA

Applicant

And

SWAZI PLASTIC INDUSTRIES

Respondent

Neutral citation: Amos Mabuza V Swazi Plastic Industries (15/2011) [2014]
SZIC 20 (April 2014)

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

Heard: 10th December 2013

Delivered: 30th April 2014

Summary: Labour Law: Employer changes terms of employment contract. The changes reduced the employee's status at work and salary.

Employee applies to Labour Commissioner for restoration of status quo ante, in terms of Section 26(2) and (3) of the Employment Act No.5/1980 as amended. Employee has 14 days to apply to Commissioner to restore the status quo ante. The 14 days period is peremptory. Employee applies to Commissioner after the 14 days period, and Commissioner rules in the

employee's favour. Held; the employee was out of time, and therefore Commissioner had no jurisdiction over the matter. Commissioner's ruling was set aside for want of jurisdiction. Employee files an application in Court challenging the changes in the employment contract. Applicant's claim is supported by a certificate of unresolved dispute. Held; application properly before Court, Court has jurisdiction to hear the matter.

JUDGMENT

1. The Respondent is Swazi Plastic Industries a company incorporated in accordance with the laws of Swaziland, and trading as such in Swaziland.
2. The Respondent is Amos Mabuza, an employee of the Respondent.
3. About the 4th March 1986 the Respondent employed the Applicant as an Extrusion Supervisor.

The written particulars of employment are attached to the Applicant's particulars of claim and are marked annexure AM1.

4. During the year 1999 the Applicant fell ill and had to undergo medical treatment. The Applicant's medical condition gradually deteriorated over the years. This condition resulted in the Applicant being absent from work on certain days as well as arriving late for work on other days. According to the Respondent, in the year 2009 the Applicant was absent from work, on account of the illness, for 22 (twenty two) days. The Respondent further estimated the amount of production time lost due to the Applicant's late arrival for work to be equivalent to five (5)

days. This situation resulted in- strained relations between the Applicant and the Respondent. The Respondent complained that the Applicant's prolonged illness and late arrival at work has seriously hampered production in the extrusion department. As a result the Respondent is unable to meet its production targets. The Respondent is accordingly exposed to risk of loss of market share and ultimately loss of profit if the situation persists.

5. The Respondent took a decision to replace the Applicant as Extrusion Supervisor. On the 5th October 2009 the Respondent demoted the Applicant to Extrusion Operator.

The Applicant began working as Extrusion Operator in November 2009. The Respondent appointed a new Extrusion Supervisor, a certain Mr Charles Mhlanga.

6. About the 19th November 2009 the Respondent notified the Applicant by letter (annexure AM4) that it had further taken a decision to reduce the Applicant's rate of pay. The Applicant's salary was reduced from E20.89 per hour to E12.49 per hour with effect from December 2009.
7. The Applicant was dissatisfied with these changes which he regarded as unfair labour practice. About the 11th January 2010 the Applicant wrote the Respondent a letter in which he registered his grievance concerning the recent changes in his employment contract. A copy of that letter is attached to the Applicant's particulars of claim marked annexure AM5. According to the Applicant, the Respondent's management failed to address his concerns despite receipt of the letter (annexure AM5).

8. Thereafter, the Applicant reported his grievance with the Labour Commissioner (hereinafter referred to as the Commissioner).

The report to the Commissioner (annexure AM6) is dated 25th March 2010. The Commissioner was called upon to exercise his *quasi-judicial* powers as contained in section 26 of the Employment Act No.5/1980 as amended.

9. There was an unexplained delay in the office of the Commissioner in dealing with the Applicant's complaint (annexure AM 6). About the 14th October 2010, the Commissioner wrote to the parties inviting them to a meeting to discuss the Applicant's complaint. The meeting was held about the 20th October 2010.

10. About the 15th November 2010 the Commissioner issued his report which is marked annexure AM 10. The Commissioner ruled in the Applicant's favour. The effect of the Commissioner's ruling was to reinstate the Applicant to the position of Extrusion Supervisor in accordance with Section 26(3) of the Employment Act. The reinstatement of the *status quo ante*, is automatic once the Commissioner rules in the Applicant's favour.

11. The Respondent failed or refused to comply with the Commissioner's ruling. In particular, the Respondent refused to reinstate the Applicant.

By letter dated 16th November 2010 (annexure AM11) the Respondent was implored (by the Applicant), to comply with the ruling, but to no avail. Thereafter, on the 15th February 2011, the Applicant instituted an application before Court, inter alia, to compel the Respondent to comply with the

Commissioner's ruling. The application was opposed. The Respondent raised points of law and further pleaded over on the merits.

12. The Applicant's prayers in the Notice of Motion read as follows:

- “ 1. *An order directing the Respondent to comply with the Department of Labour's Opinion 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 Emalangi) 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/or alternative relief.”*

(Record page 1)

13. The matter was argued and judgment was handed down on the 20th November 2013, under reference SZIC 33/2013 (Case No.15/2011). The Court found *inter alia*, that the Applicant filed his complaint with the Commissioner out of time i.e. contrary to Section 26(2) of the Employment Act. The Commissioner was therefore not seized with jurisdiction when he heard the matter. The Respondent's point *in limine* which challenged prayer 1, of the Notice of Motion was upheld. Prayer 1 of the Notice of Motion was accordingly

dismissed. The Court ordered the parties to proceed to trial in respect to prayers 2 and 3 of the Notice of Motion.

14. The effect of the judgment of this Court dated 20th November 2013, is that the Commissioner's ruling (annexure AM10) was set aside. As a result, the Applicant is unable to access the protection that is offered in Section 26 (3) of the Employment Act; that is restoration of the *status quo ante*.
15. After the Court had issued its judgment, the Respondent raised another point of law which reads as follows:

“ NOTICE TO RAISE POINT OF LAW

The Respondent intends to raise the following point of law at the hearing of this matter.

The Honourable Court in its Judgment of the 20th November 2013 found that, and it was common cause that the changes complained of by the Applicant were terms and conditions of employment contained in a form in terms of Section 22 of the Employment Act.

The Court found that the employee failed to comply with Section 26[2] of the Employment Act by filing [failing to file] his complaint within 14 days of notification of the changes in his terms and conditions of employment.

In terms of Section 26(1) of the Employment Act, therefore, as a result of the failure to submit such complaint as aforesaid, the changes are “deemed to be effective and to be part of the terms of service of that employee.”

In the circumstances there are no further issues remaining for the Court to determine and the Applicant's Application should be dismissed in its entirety.”

16. The Respondent's point of law is predicated on the provision of section 26(1) of The Employment Act. For the sake of completeness, the Court will reproduce Section 26 in full:

“ Changes in terms of employment

26(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 endeavour 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.”

17. The Respondent contended that since the Court has set aside the Commissioner’s ruling which he (Commissioner) made under Section 26 (3) namely (annexure AM 10); that means the provision of Section 26(1) automatically comes into effect. The changed terms which the Respondent introduced in the employment contract are deemed to be effective and to be part of the terms of service of that employee. The relationship between the parties is henceforth governed by the contract of employment with the necessary changes

incorporated therein. According to the Respondent, a new contract of employment (incorporating the changed terms) has come into existence which is binding on the parties. There is therefore no dispute before Court, the matter has been finalised.

18. It is important for the Court to examine the extent to which the changed terms have affected the contract of employment.

The word ‘deemed’, in Section 26(1) is instructive and a clear understanding of the use of that word in the context is crucial. The word ‘deem or deemed’ has been defined or explained by various authorities as follows:

18.1 “ *The word ‘deemed’ is capable of meaning ‘rebuttably presumed’ that is, presumed until the contrary is proved.*”

SAUNDERS JB: WORDS AND PHRASES LEGALLY DEFINED, 2nd edition, 1969 (Butterworths), Volume2, ISBN 406 08032 1

at page 28.

18.2 “ *The decision in Rex V Norfolk Country Council, 65 L.T., p.22, may be usefully referred to, and the remarks of JUSTICE CAVE are very apposite. So that the word ‘deemed’ must be here taken in its general sense as meaning ‘considered’ or ‘regarded;*”

BELL WHS: SOUTH AFRICAN LEGAL DICTIONARY, 2nd edition (Juta & Co) 1925

ISBN (not available) at page 162.

19. Where an employee, (whose terms of employment have been changed by the employer), has failed to challenge or has failed to successfully challenge the proposed change, the new terms shall be considered or regarded as incorporated in the employment contract. That means the change in the terms of the employment contract is a reversible process. The new terms in the employment contract will be effective until the process is reversed. The Court has the power to reverse that process.

20. Even if the employee fails to challenge the introduction of new terms in the employment contract within the 14 days period provided in Section 26(2), the legislature has left the door open for an aggrieved employee to challenge those unilateral changes in his employment contract by lawful means other than Section 26 of the Employment Act. Section 26(1) of the Employment Act creates a rebuttable presumption that the new terms in the employment contract have been lawfully incorporated. It is up to the employee to rebut that presumption by challenging the employer's conduct in Court. This is the approach which the Applicant has adopted.

21. Section 26 of the Employment Act does not necessarily oust the jurisdiction of the Industrial Court in granting remedy to an employee who is aggrieved by the employer's unilateral decision - to change the terms of the employment contract. The effect of Section 26 is to delay the Court's intervention until the matter is either disposed of by the Commissioner (by way of a written opinion) or is referred to the Court, by the Commissioner, for adjudication.

The purpose of Section 26(2) and (3) of the Employment Act is to give the aggrieved employee a fast and effective remedy to restore the *status quo ante*, in the event the Commissioner finds in the employee's favour.

22. It appears clearly from the point of law raised; that the Respondent has approached the Applicant's application as if it was dismissed in its entirety and that the matter is *res judicata*. That thinking is incorrect. The judgment of this Court dated 20th November 2013, did not pronounce on the legality of the unilateral changes in the employment contract. However, the Court did set aside the decision of the Commissioner issued in November 2010 (annexure AM10).

The Applicant is entitled to approach the Court in order to challenge the legality of the employer's unilateral changes in the employment contract.

23. The Applicant has approached the Court armed with a Certificate of Unresolved Dispute (annexure AM7). The certificate indicates that CMAC attempted to reconcile the parties through conciliation, but failed. By CMAC is meant the Conciliation, Mediation and Arbitration Commission established in terms of Section 62(1) of the Industrial Relations Act No 1/2000 as amended. The certificate indicates further that the issues that were subject of conciliation at CMAC were the Applicant's demotion from Extrusion Supervisor and the loss of salary as a result of the demotion. These are the same issues that appear in the Notice of Motion. The Applicant has approached the Court on the authority of the Industrial Relations Act to challenge an irregular change in his employment contract. The Applicant is entitled to be heard on his claims viz. the demotion and the subsequent loss of salary. The Respondent's point of law

has no basis and is accordingly dismissed. The matter should proceed on a date to be arranged with the Registrar.

24. Wherefore the Court orders as follows:

24.1 The point of law raised by the Respondent dated 20th November 2013 is dismissed.

24.2 The issue of costs is reserved until finalisation of the matter.

Members agree

D. MAZIBUKO
INDUSTRIAL COURT JUDGE

For Applicant:

Mr N.Ginindza

N.E. Ginindza Attorneys

For Respondent:

Mr. M. Sibandze

M.Sibandze Attorneys