IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 29/2011

In the matter between:-

BERNARD HOUGH **APPLICANT**

AND

U.S.A. DISTILLERS (PTY) LTD **RESPONDENT**

Neutral citation	**:**	*Bernard Hough v U.S.A. Distillers (Pty) Ltd (29/2011) [2014] SZIC 29 (15 July 2014)*
CORAM	**:**	**DLAMINI J,** *(Sitting with **D. Nhlengetfwa & P. Mamba** Nominated Members of the Court)*
Delivered	**:**	**15 July 2014**

Summary: ***Labour law – Unfair Dismissal - Retrenchment:*** *Applicant alleging that the termination of his services disguised as retrenchment was procedurally and substantively unfair.* ***Held:*** *Dismissals will only be deemed to be fair if it can be proved that it was initiated following fair procedures, and for fair reasons.* ***Held:*** *In retrenchments, the duty of the Court is pass judgment on whether such a decision was genuine and not merely a sham.* ***Held:*** *Termination of the Applicant's services in casu was procedurally and substantively fair.*

1. Bernard Hough, a South African national, is a former employee of the Respondent. His services were terminated by the Respondent in September of 2009, and he has qualms with the manner he was dismissed, hence now his present application to this Court for determination. As a preliminary issue though the Respondent sought the permission of the Court to amend its reply. Essentially, the Respondent sought to replace its paragraph 5.2 of its reply which initially read as follows;

"Respondent states that, due to unfavourable trading conditions, a decline in markets, and the need to remain competitive, the Respondent undertook a restructuring exercise in terms of which, it also amongst others, re-assessed its staffing requirements"

The Respondent now wanted to delete this paragraph and replace it with one that was to read as follows;

"Respondent states that, due to the unfavourable trading conditions, a decline in market, the Applicant's medical condition, couple with his inability to perform, and the need to remain competitive, the respondent undertook a restructuring exercise in terms of which, it among other factors, re-assessed its staffing requirements, relative to its need to have efficient production line" (Sic)

2. The Respondent was also seeking to delete its initial paragraph 8.2 of its reply which read as follows;

"Respondent states that the Applicant was paid his notice pay."

And it now wanted it to read as follows;

"Respondent states that the Applicant was paid notice pay, salary for up to April 2010, and provided with housing until June 2010."

3. These amendments as sought by the Respondent were strenuously opposed by the Applicant's representative, Attorney Mr. Mamba. Attorney Mamba contended that the essence of the amendments was to raise a new defence for the Respondent, which was not initially pleaded. He pointed out that the defence of the Respondent to the Applicant's claim for unfair dismissal has always been that the Applicant was lawfully retrenched. He argued therefore that allowing the amendments would render it contradictory to the initial defence of lawful retrenchment as it would now be bringing in a defence of the Applicant having been terminated because of a medical condition.

4. In support of this amendment, the Respondent's Representative, Attorney Mr. Jele, submitted that the whole purpose of the amendment was to properly put the defence of the Respondent before Court. Jele further submitted that as he was preparing for this trial, he came across certain documents which entailed that he consults thoroughly on same. Upon such further consultation and on being properly briefed by his clients, Attorney Jele came to the conclusion that the issues now raised had to be so introduced through the amendment now sought.

5. The Court after considering the submissions and arguments of both Counsel on the issue, issued an extempore ruling in terms of which the amendment in terms of paragraph 5.2 was refused and that in respect of paragraph 8.2 allowed. Since the Rules of this Court do not make provision for the procedure to follow in the amendment of pleadings, the Court in arriving at this ruling was largely guided by the High Court Rules – specifically Rule 28. A practical application of this rule involves the exercise of discretion by the Court and which discretion has to be exercised judiciously.

6. The principle in relation to amendments is that they (amendments) will always be allowed unless the application to amend is *malafide* or unless such amendment would cause injustice to the other side which cannot be compensated with an accompanying order for costs where appropriate. Put

differently, unless the parties cannot be put back, for the purpose of justice, in the same position as they were when the pleading which the application seeks to amend was filed.

7. Applying the above principle to this amendment now being sought by the Respondent the Courts notes the initial position of the parties to have been as follows; In terms of the letter terminating the Applicant's services dated 21 September 2009, the reasons for the termination of the Applicant was articulated by the Respondent as follows:

"…The Directors of the Company have taken their time to re-asses an re-evaluate your position as an employee of USA Distillers. Due to the increasing cost of raw materials and poor economic environment in which the Company is currently operating, the resulting lowered profitability levels have necessitated that your services be terminated forthwith"

8. Clearly, the Applicant's medical condition and his ability to perform were not initially part of the reasons advanced for the termination of his services. In fact, it would appear that the Company was very happy with the work of the Applicant, such that at paragraph 4 of the letter terminating his services the Chairman – a Mr. J. Caldeira – stated thus; *'Nonetheless, I wish to pass my gratitude and appreciation for the good work you have done for the*

Company for all your period of service with it, and wish you all the very best in your future endeavours.' The Court is in full agreement that allowing this specific amendment would render it contradictory to the initial defence of lawful retrenchment as pleaded thus greatly prejudicing the Applicant. And for the Court to allow such amendment at this stage of the proceedings would obviously cause an injustice to him, which cannot ordinarily be compensated with an order for costs. The aim here, being to do justice between the parties by deciding the matter on the real issues between them. The underlying principle in such issues being that, where a party has already made its case in its pleadings, and he wishes to change or add thereto, he must explain the reason or show prima facie that he has some deserving consideration, a triable issue so to say. It is for the aforegoing reasons that the amendment in respect of paragraph 5.2 was refused and that in respect of paragraph 8.2 allowed.

9. The evidence of the Applicant under oath was as follows; he is a South African national residing in Cape Town, South Africa. He is a qualified professional with three Science degrees, including a Masters. He has been employed in different organizations in South Africa and in the Swaziland and has vast experience in wine and brandy distillation and production. In Swaziland he worked for Simunye Distillers for five years and his tenure came to an end in February 2001.

10. After his Simunye Distillers tenure he went back to Cape Town and was without a job for close two years (20 months) before securing his next job in the country with the Respondent, USA Distillers. He got this job after getting wind of it from a former colleague at Simunye Distillers about the vacant position of Distillery Manager. He telephoned a certain Barry De Beer about the position and he promised that he would take it up with the founder of the company. Indeed he received a call about the position from a certain Joe Caldeira, the founder and Chief Executive of the company. They agreed that he was to take up the position and further on the salary (E32,000) and perks which included a company car and accommodation. He was thereafter immediately flown into the country from Cape Town to be shown the company plant in Big Bend and his accommodation. Then in December 2002, he started executing his duties as Production Manager.

11. On taking up his duties, he first assessed the plant and noted down what urgently needed to be attended to in order to make it run properly. He had been informed that the plant was running between 20 and 30 thousand litres of poor quality alcohol, as opposed to potent and high quality alcohol. According to the Applicant, the Plant could not produce potent and high quality alcohol because the condensing system was not functioning properly. Having assessed the plant and diagnosed its shortcomings, the Applicant secured the services of an engineer from Cape Town who

attended to the condensing system. And the system was fixed and production increased to 75,000 litres. The Respondent company's overseas customers were pleased with the top grade quality of the alcohol produced. Even Mr. Caldeira was pleased with the production levels and he gave the Applicant a free hand in running the plant to efficient production. He even advised the Applicant that he had a job for life.

12. Then at the end of May 2003, to his utmost surprise, the Applicant received a telephone call from Mr. Caldeira in California effectively terminating his services. Apparently, according to the Applicant, Mr. Caldeira said he did not need his services anymore since the plant was now running perfectly. He informed the Applicant that Joe Snyman (a new Managing Director) and a Mr. Mc Creedy, who did fermentation, were going to continue with the production. At the time of the termination of his services the Applicant earned E32,000.00. Of this amount, E8,000 was paid into his Swaziland Standard Bank account and the balance of E24,000 paid into his South African ABSA Bank account.

13. Following his dismissal at the end of May 2003, he continued staying in the company house until December 2003. And all this time he was still paid his monthly salary and still enjoyed some of the benefits such as full usage of the Company cellphone. Then in January of 2004 he was recalled by the

new Managing Director, a Mr. Loui Borrageiro, who had replaced Synman after his dismissal (Snyman) together with Mc Creedy. Borrageiro now wanted the Applicant to report back to work because they were now having problems with production in the plant. He spoke to Mr. Caldeira who also confirmed that he wanted him back in the Company, but now at a reduced monthly remuneration of E20,000. The Applicant testified that he was now desperate and as such he had no choice but to take the reduced remuneration, especially because his daughter had just enrolled at a tertiary institute. Indeed he resumed his duties around mid-January 2004.

14. Mr. Hough further testified that all this time he was executing his duties without a work permit, and that he only secured one in June of 2004. This means that he was working in the country illegally all this time. And to beat the work permit requirement he would depart and re-enter the country after the lapse of his 30 days visitor's permit.

15. Further evidence by the Applicant was that his remuneration remained at E20,000 for about seven months and was increased to E22,000 in August of 2004. A year later it was again increased to E27,000. Then in October of 2007 it was again increased to E32,000. And at the time of his dismissal in September 2009 it had increased to E40,000.

16. Narrating the events which culminated in his dismissal, the Applicant testified that in the early part of the year 2009, the company embarked on a new project which was construction of a bigger evaporator. The evaporator machine extracted concentrated molasses spillages. The concentrated molasses spillages were very rich in potassium and were used by the sugar companies as fertilizer. This project was to be commissioned by NCP, a company based in Durban South Africa.

17. Then in August 2009, he was advised by Mr. Borrageiro that he had to go on leave for a month. This was so that the company could bring in a certain Mr. Newman Ngcongo, who was the Production Manager at NCP Durban, to look through the plant and decide on what changes had to be made on the plant. Indeed the Applicant did as he was instructed and went on leave. When he came back from leave he telephoned Mr. Borrageiro who told him to report for work on 21 September.

18. When he returned on 21 September, 2009, he discovered that Newman Ngcongo was now running the show, so to say. He was now chairing the production meetings. This shocked the Applicant, mainly because he was not even aware of who this Newman was and why he was now running his meeting when he initially came to commission the new plant and train the operators. Mr. Borrageiro later introduced Newman to the Applicant, telling

him (Applicant) that he (Newman) had been appointed as production Manager and that he (Applicant) was to report to him. To that end he requested Newman to show the Applicant he (Newman) had made to the plant in his (Applicant's) absence. According to the Applicant, the changes were insignificant, and that one of such changes had resulted in loss of production for 3 days.

19. This upset the Applicant. As if this was not enough, he then received a call from Mr. Caldeira informing him that he had bad news for him. He broke the bad news as being that he could not have two production Managers (Applicant and Newman) and that therefore he would have to let the Applicant go. This really devastated the Applicant. According to him, he went ice-cold on being informed that he was being dismissed. He tried to be strong though. He asked Mr. Caldeira to let him stay in the company house for 6 months as his house in Cape Town had tenants whom he had to give a 6 months notice to vacate. Caldeira had no problem in allowing him to continue occupying the company house for 6 months and even promised to help him with some money in the 6 months since he would be having no source of income. As a parting shot, Caldeira told the Applicant to get his termination letter from the Group finance Director and that he had to clear his desk and be out of the company premises within an hour.

20. The Applicant referred the Court to his letter of termination which is at page 9 of his bundle of documents. It is dated 21 September, 2009, and was signed off on behalf of Caldeira. At paragraph 2 thereof the letter, which is headed 'TERMINATION OF YOUR SERVICES AS AN EMPLOYEE OF USA DISTILLERS', the reasons for the termination of the Applicant's services, and as captured at paragraph 7 herein above, are; the increasing cost of raw materials, the poor environment in which the company was operating and the lowered profitability levels. The Applicant testified that the contents of the letter terminating his services baffled him because its contents were not what he had been informed by Caldeira on the phone. Making matters worse, according to the Applicant, was that he not been previously consulted about the impending termination of his services.

21. After termination of his services the Applicant continued staying in the company house until the beginning of May 2010 when he then left for Cape Town. As promised by Caldeira, he was paid his salary for 6 months even though he was no longer an employee of the Respondent company. This was with effect from the month of November, 2009, up to April of 2010. After his dismissal the Applicant and his wife also enjoyed use of the company cell phones until he and his family were repatriated back to Cape Town. At the time of the hearing of this matter, the Applicant testified that he was still unemployed and was currently relying on his wife for support.

As things are at the moment, the Applicant testified that he was in dire financial straits. A direct consequence of which has been that he has had to sell some of his assets and cash in on his retirement funds.

22. Under cross examination by Attorney Jele, for and on behalf of the Respondent, it was put to the Applicant that in joining USA Distillers he (Applicant) had been contacted by Barry De Beer about an available consultancy role, similar to the one De Beer was engaged in. The Applicant however vehemently disputed this allegation maintaining that he was engaged as a Production Manager on a permanent basis and never as a consultant. He also disputed the suggestion that it was De Beer's idea that Van Niekerk be engaged to assist with the condensing system and thus increasing the productivity levels. Attorney Jele also put it to the Applicant that when he had completed the task for which he was engaged as a Consultant he then had to leave the company, which the Applicant again denied, maintaining instead that he had been dismissed by Caldeira who had called him from California to tell him that his services were no longer needed.

23. Still under cross examination, the Applicant also disputed the allegation that he was employed by USA Distillers in January 2004, instead maintaining his evidence in chief that he was recalled in January 2004,

though at a reduced remuneration of E20,000 instead of the E32,000 he had been receiving.

24. It also emerged under cross examination that the Respondent company had made a decision, in the latter half of the year 2008, to construct evaporators and that the Applicant had been engaged on this. However the Applicant denied that he expressed reservations about the project and that it created hostility between him and Borrageiro and De Beer. Instead he pointed out that the construction of the evaporators was going to be in the best interest of the company since it was dumping millions of effluent in illegally constructed earth dams, and that this effluent was an environmental hazard. So as far as the Applicant was concerned, the commissioning of the evaporator brought a solution to the environmental hazard since it was going to significantly reduce the volumes of the effluent and create a product which was going to be of market value. He pointed out though that he might have raised concerns about the new project and how they as employees were going to cope with a project of this magnitude, and not that he was against it.

25. Attorney Jele further put it to the Applicant that as a consequence of his reluctance to be involved in the evaporators project, De Beer then recommended that Newman Ngcongo be brought in for the completion,

commissioning and training of staff on same for a period of 9 months. This again the Applicant disputed, clarifying that the staff had been informed that Newman had initially been brought in to teach them (staff) on how the vertical evaporator functioned, and that he was only going to be there for 6 months as he would be enroute to Mauritius where there was another NCP plant.

26. Jele then advised the Applicant that his instructions were that when the Applicant exhibited his attitude towards the project, Mr. Caldeira then engaged him (Applicant) to discuss his attitude towards the project commissioning, his reluctance to be involved with the rest of the management team and on the challenges the company was facing due to the global crunch. And that it was after this engagement that the Applicant was asked to consider his position as an employee of the company. Whilst he was away on the one month leave, the company then took a business decision that it could not sustain having the Applicant, De Beer and Newman (consultant) on its payroll. As a result, the Applicant was then retrenched – and principally due to the economic downturn.

27. When Jele suggested to the Applicant that Newman left USA Distillers after the commissioning of the project and training of staff, this was strongly denied by the Applicant who stated instead that Newman left in

June 2013, and that all along he occupied his position. And to substantiate the claim that he took his position he pointed out that in the Company website he was listed as a Production Manager. That was the case of the Applicant.

28. First to testify in support of the Respondent's case was Barry De Beer. His evidence under oath was, in a nutshell, as follows; He is a Consultant in various distillation plants, and that he first came to Swaziland between 1994 and 1995. In Swaziland he first worked for the Royal Swaziland Sugar Company's Distillery at Simunye and that he left RSSC in 1999. He was then approached by Mr. Caldeira to commission the Respondent's distillery in Big Bend, which he agreed to, though as a Consultant.

29. De Beer further testified that he first met the Applicant whilst he (De Beer) was still a Consultant at RSSC, where the Applicant was employed just before he left in 1999. In fact, according to De Beer, he was in the panel that interviewed the Applicant. And in interviewing him he was impressed with his educational qualifications and the fact that the Applicant had a clear understanding and knowledge of pot still distillation.

30. Having joined USA Distillers, it came to a point where the company needed someone on a fulltime basis to manage the plant, since he (De Beer) was

constantly in and out of the country. De Beer then spoke to Caldeira about engaging the Applicant permanently to manage the plant. Indeed the Applicant was engaged around 2002. At the time the Applicant joined the Respondent company, there was no real production as the paramount focus was on getting the plant to run consistently to maintain a good and steady production of alcohol.

31. De Beer's further testimony regarding the evaporator project was that the Applicant was not enthusiastic about it. He was distant to it, so to say, and was therefore not involved in its planning, commissioning and construction. The evaporator project was very crucial to the company according to De Beer, yet the Applicant did not embrace it.

32. Explaining about Newman Ngconga's role, De Beer had this to say: He confirmed that Newman did join USA Distillers and that he (De Beer) played a pivotal role in him joining. Newman was brought in because of his expertise on the new evaporator being commissioned as he had previously worked on a similar one at a NCP distillation and evaporation plant in Durban where he was based and on another one at a plant in Mauritius. He was also brought in to assist in the training of personnel to effectively run and manage the new evaporator.

33. De Beer further explained that the arrangement with Newman was that he was released from NCP Durban to work for USA Distillers in Swaziland, on condition that he would still be retained as an employee of NCP. This meant that he was retained as an employee of both these companies, according to De Beer. At the time Newman arrived, the Applicant was still an employee of USA Distillers. And later on, the Applicant's services were terminated but De Beer was not privy to the reasons that informed this decision. He clarified though that as he knew it, Newman was never brought to USA Distillers to replace the Applicant. He also pointed out that Newman replacing the Applicant could have perhaps manifested itself after the Applicant had been terminated, not that it was the initial idea.

34. Under cross examination witness De Beer confirmed that the Applicant was in fact employed by USA Distillers in 2002. He confirmed as well that it was the Applicant who suggested in 2003 that Van Niekerk be engaged as a consultant to assist in production of clean quality alcohol. He also confirmed that Newman only left USA Distillers in June of 2013 or thereabout since having joined them in 2009 when construction of the new evaporator begun.

35. The next witness to testify in support of the Respondent's case was Luis Borrageiro. He introduced himself as the Operations Director and that he

has been with the Respondent company since its inception. As Operations Director he oversees the day to day operations of the company and reports daily to Mr. Caldeira who is based in the United States of America.

36. Borrageiro further testified that the Applicant started working for USA Distillers on a probationary Consultancy position from the year 2002. When the company took him as a consultant he was from Simunye and that he worked for a period of about three months after which he was informed that he did not fit into the philosophy of the Respondent. He was thus not employed at that time. However, at the end of the year 2003, in December to be specific, he was re-engaged since De Beer had decided to leave the company. Indeed he was re-engaged but now on reduced remuneration. He accepted this new arrangement but complained about the now reduced remuneration. After re-engaging the Applicant though, working relations were not easy as he had to be managed carefully. The company also henceforth applied for a work permit on his behalf, since previously it had not done so.

37. Borrageiro also testified that prior to the arrival of the Applicant, the company was producing up to 70,000 liters of not good quality alcohol, and that the arrival of the Applicant saw the improvement of the quality of the alcohol produced. He confirmed though that when the company terminated

the services of the Applicant in 2003, he, together with Van Niekerk had helped increase the daily production to 75,000 liters of good quality alcohol.

38. Regarding the attitude of the Applicant, Borrageiro testified that it came to a point where he wrote a letter to him (Applicant) raising a number of concerns related to his conduct and attitude at work. Thereafter a meeting was held in which the Applicant's wife was in attendance together with the Financial Director and this witness. It would seem this meeting was successful as Borrageiro testified that after the meeting and going forward, the attitude of the Applicant changed and working relations with the Applicant improved.

39. On the issue of the company's problem with effluent, Borrageiro's evidence confirmed that of the Applicant to the effect that the company wanted to turn the effluent (which was all along being discharged to the environment therefore preventing the company from securing an environmental certificate) into fertiliser and that the survival of the company depended on this project. According to him, the value of this project was in the region of E50,000 000, indicating that this was a very significant project indeed. However, the Applicant was not enthusiastic about the evaporator project.

He was obstructive to it and was looking to spoil everything, according to Borrageiro. He appeared to be insecure about its introduction.

40. Since the Applicant had informed Borrageiro that he did not know much about evaporators, Borrageiro engaged De Beer on the issue and he (De Beer) came up with the name of Newman Ngcongo, whom he said had considerable expertise on the project at hand. As Newman was an employee of NCP Durban, his employers were engaged on releasing him to USA Distillers to assist on the project. Indeed Newman was released on an agreement that he would be attached to USA Distillers for nine months from August 2009. Newman's core responsibilities at USA Distillers were to commission the evaporator and also train staff on same.

41. It was Borrageiro's evidence that some 6 months before Newman was attached to USA Distillers, in February 2009 to be exact, the company had embarked on a retrenchment exercise that saw all their Drivers being retrenched. This was principally due to the world economic downturn. USA Distillers was not spared in this economic crunch and it took a heavy strain, hence the decision to retrench in some other departments. As it is, it then came to a point where the company also decided that the Applicant had to go. In arriving at the decision to retrench the Applicant, so stated

Borrageiro, the company's decision was informed by his discipline, negativity and obstructiveness.

42. Borrageiro confirmed having asked the Applicant to take a month long leave, which he stated was meant to refresh the Applicant. When asked by Attorney Jele if he had informed the Applicant that Newman was the new Production Manager, his response was that he was not sure whether he did or not. But he added that '*it could well have been that we were thinking of giving him a role, and he did eventually take a role in the company.*' After nine months though, Newman left USA Distillers. He was later to be employed permanently by USA Distillers after resigning from his position in at NCP. All this apparently happened within a space of a month or two, according to Borrageiro.

43. On the decision to terminate the services of the Applicant, Borrageiro clarified that the decision was taken around September 2009, when Newman came to the plant. He further stated that even though he had been terminated, the Applicant was allowed to stay in the company house until he was repatriated to Cape Town in May 2010.

44. Under cross examination, Borrageiro maintained that when the Applicant was initially engaged as a consultant he was from RSSC in Simunye and

that De Beer's evidence that he had left Simunye and was back in Cape Town was confused. On his termination, he clarified that because of the Applicant's obstructiveness and attitude in relation to the evaporator and the fact that he was not a team player, which, cumulatively was going to prevent the company from acquiring an environmental certificate it was so desirous for, the company decided on terminating his services.

45. Coincidentally, according to Borrageiro, this was at the same time Newman came on board. And witness Borrageiro went further to state under cross examination that Newman was able to carry out the work that would have been the responsibility of the Applicant. He further confirmed that when the Applicant returned from the one month leave on 21 September 2009, he called them (Applicant and Newman) to his office where he formally introduced Newman to the Applicant as the new Production Manager, and further instructing Newman to show the Applicant changes that he (Newman) had made around the plant in his one month absence. Interestingly this was on the very same day the Applicant's services were terminated.

46. When Attorney Mamba wanted to know why it was even necessary to show the Applicant these changes when he was going to be dismissed on the very same day, Borrageiro's response was this; '...*The decision had not been*

made yet. Then later in the day the decision was made. We had various meetings over the phone and in the board room. We were looking at the consequences – like in a game of chess, you have to decide on the consequences. When he came in the morning it was business as usual...' He clarified though that at USA Distillers final decisions rest with Caldeirra.

47. Attorney Mamba under cross examination also wanted clarity on the Drivers that were retrenched in February of 2006 and how they were linked to the Applicant's retrenchment some seven months later. To this, witness Borrageiro's response was that Bernard Hough was not part of the employees retrenched in February, but that later on in the year a decision was then made to also retrench the Applicant. And as if to reemphasise his earlier evidence, he again clarified that the decision to retrench the Applicant was informed by his obstructiveness, attitude and ill discipline which made the company not to move in the direction management wanted. That was the criteria used in deciding on the retrenchment of the Applicant according to Mr. Borrageiro. When Attorney Mamba wanted to know if the Applicant was consulted and engaged on the ultimate decision to retrench him, Borrageiro's bold response was that he was not as this decision was deliberated on by the Directors only, and without his input.

48. Probing the issue of the renewal of the employment reference for the Applicant, Mamba wanted to know from Mr. Borrageiro why he refused to renew the Applicant's reference letter which he could use in his quest to secure alternative employment, his response was that he refused to do so because the Applicant had taken the company to Court. That was the case of the Respondent.

49. In his closing submissions on behalf of the Applicant, Attorney Mamba maintained the Applicant's contention that his dismissal was both procedurally and substantively unfair. He referred the Court to the Respondent's replies and specifically at paragraph 5.3 thereof. In the replies, the Respondent states thus;

> *"5.3 In view of the fact that the Respondent had two Production Managers, a decision was taken to reduce the number of Production Managers and invoking the principle of LIFO, the Applicant's position was declared redundant"*

50. Mamba pointed out that in its replies the Respondent was effectively saying it could not have two Production Managers. However in the *viva voce* evidence presented to Court, the evidence of the Respondent was now that Newman Ngconga was engaged as a consultant. In fact, the evidence in the

replies on the reduction of the number of Production Managers is in line with the evidence of the Applicant both in-chief and under cross examination that Caldeira had told him that he could not have two Production Managers and that he (Caldeira) would have to let Mr. Hough go. Interestingly though, Mamba submitted, Mr. Caldeira was not called as a witness whereas his evidence was crucial. He was the 'missing witness in the chair', since the Respondent elected not to call him.

51. Attorney Mamba also argued that the Respondent also alleges, in its *viva voce* evidence through its witnesses, that Mr. Hough was mentally sick and therefore he was a very difficult person to work with and had to be managed carefully. Over and above this, they also allege both in their replies and through their witnesses that due to unfavourable trading conditions, a decline in markets and the need to remain competitive, the Respondent undertook a restructuring exercise in terms of which it reassessed its staffing requirements culminating in the ultimate termination of the Applicant. However, in all this, the Applicant was never consulted, Attorney Mamba pointed out. Be that as it may, Mamba went on, the Respondent in conducting its defence in this matter seemed to be vacillating between at least three different defences, as mentioned in the preceding paragraphs.

52. On behalf of the Respondent, Attorney Jele started off by addressing the Court on the issue of the underpayment claim. He pointed out that the Applicant's claim is predicated on the allegation that the underpayment took place between January 2004 and October 2006. Jele went on to submit that the dispute of the Applicant was only reported in August of 2010, whereas the issue giving rise to the dispute of underpayment arose in October, 2006, at the latest. And as at October 2006, a period of almost 36 months had elapsed since the issue giving rise to the dispute first arose. He referred the Court to the case of **Jameson Thwala v Neoapak Swaziland IC case number 18/1998** where the Court defined the term 'issue giving rise to the dispute' to mean when all the facts necessary to sustain a cause of action are available. Which according to Jele, in *casu* was in October of 2006.

53. Jele then submitted that in terms of section 76 of the Industrial Relations Act, no dispute may be reported to the Commission if more than 18 months has lapsed since the issue giving rise to the dispute first arose. This in effect means that the claim of the Applicant for underpayment should fail on the basis that it had prescribed, and therefore this Court cannot take cognisance of same. This Court is inclined to agree with Mr. Jele that a dispute may not be reported if more than 18 months has elapsed since the issue giving rise to the dispute first arose. Indeed the law is clear that if 18 months has

elapsed such dispute would have prescribed. This in effect means that the claim for underpayment by the Applicant in this matter should fail.

54. On the issue of the termination of the Applicant's services, Attorney Jele submitted that the Respondent company took a managerial decision to retrench the Applicant on the grounds of redundancy. He rightfully pointed out that in terms of the law an employer is obliged to have a commercial or sound reason for so doing. And in this case he attributed the worldwide financial crisis which had an impact on the Respondent's business and its markets. The second obligation, according to Jele, is that the employer must consult the affected employees on the managerial decision to retrench. Jele was quick though, and rightfully so, to concede that the Respondent had not discharged the onus of demonstrating that indeed there was adequate and proper consultation in the case of the Applicant.

55. Be that as it may, so Jele further submitted, the fact that the Respondent employer failed to comply with the retrenchment guidelines does not, in the case of the Applicant, mean that he was prejudiced by such failure to consult him. The Applicant should have demonstrated how he was prejudiced by such failure to consult him, that is to say, he should demonstrate what difference the failure to consult him would have made.

56. This Court has previously stated that all cases of alleged unfair dismissal are assessed on the basis of two criteria – namely; substantive and procedural fairness. No dismissal will ever be deemed fair if it cannot be proved by the Employer, that it was initiated following fair procedures [procedural fairness] and for a fair reason [substantive fairness]. The substantive fairness of any dismissal is to be determined on the basis of the reasons on which the Employer relies for arriving at the decision that it no longer requires the services of the Employee and ultimately terminating his services. In this matter before us, the Applicant alleges that his services were unfairly terminated and the Respondent counter alleges that his services were terminated fairly, raising the defence of retrenchment. The law requires that for a retrenchment to be valid, it must be substantially fair and just towards the employees affected. This means that a valid (*bona fide*) and fair reason must exist for the termination of the employee's services on account of operational reasons. In retrenchment, the employer is entitled to take the preliminary decision to retrench its employees on its own, however, the employer may not finilise that decision before consulting with the employee(s) involved. This in effect means that it is only after the exhaustion of the consultation process that the employer will be entitled to unilaterally decide on whether to ahead with the retrenchment exercise.

57. Substantive fairness for retrenchment also requires that for the reasons of such retrenchment to be accepted as valid the employer has to show the following; *a) that all possible steps have been considered and taken to prevent the retrenchment or minimize same, b) that the alternatives are fair and reasonable and c) that such termination of the employee(s) services through retrenchment was a last resort.*

58. Procedural fairness of a retrenchment requires that the affected employee(s) be given reasonable prior notice, in writing, of the impending retrenchment and further invite the employee(s) to meaningful consultations on the issue. In this notice, the employer is obliged to disclose the following; *a) the reasons for the retrenchment, b) alternatives considered by the employer to avoid the retrenchment, c) the number of affected employees, d) the selection criteria applied, e) dates when the retrenchments will take effect, f) proposed severance payout and how it is calculated etc.*

59. Procedural fairness also places a duty on an employer to first engage in meaningful consultation, which is a process in which the parties engage in a joint problem solving exercise. In the consultation process the employer has to afford the employee the opportunity to make input on the retrenchment process envisaged and further consider such representations as proposed by

the employee. **[See: Van Jaarsveld and Van Eck in 'Principles of Labour Law' 3rd edition, 2005]**

60. Now, coming to the matter at hand, the case of the Applicant is that the termination of his services by the Respondent was both procedurally and substantively unfair. In his evidence in-chief and under cross questioning his case was that Mr. Caldeira informed him that he had bad news for him, and he broke the bad news as being that he could not have two production Managers (Applicant and Newman) and that therefore he would have to let the Applicant go (See paragraph 19 above).

61. The Respondent on the other hand counter argued that there were compelling and fair reasons for the termination of the Applicant's services. In its pleadings the Respondent stated these to be unfavourable trading conditions, a decline in markets, coupled with the need to remain competitive, it (Respondent) undertook a restructuring exercise in terms of which it assessed its staffing requirements. At paragraph 5.3 of its replies, the Respondent submits as follows, *'5.3 In view of the fact that the Respondent had two Production Managers, a decision was taken to reduce the number of Production Managers and invoking the principle of LIFO, the Applicant's position was declared redundant…5.4 The Applicant was consulted on the factors and circumstances giving rise to the decision to*

reduce the number of Production Managers and the restructuring of the company.' This, essentially, was the Respondent's clear and concise statement of the material facts and legal issues upon which it (Respondent) relied in its defence and in terms of Rule 8(2)(d) of the rules of this Court.

62. But the *viva voce* evidence of witness Loui Borrageiro was at a total variance to that which was initially pleaded in the Respondent's papers. According to the evidence of Borrageiro, the main reason for the termination of the Applicant's services was because the Respondent had desperately wanted to get an environmental certificate and the Applicant was obstructive and uncooperative towards the endevour of setting up and commissioning the evaporator. In his own words Borrageiro stated thus to the question by Attorney Mamba whether the Applicant was terminated because of his conduct at work; *'…Yes, he was terminated because he was obstructive…he was not being a team player.'* Earlier on, in his evidence in chief, Borrageiro had testified that because of the economic downturn, and with the company taking a huge strain, it (Company) decided to retrench the Applicant. And that the decision to terminate the Applicant was also informed by his discipline, negativeness and obstructiveness.

63. The letter terminating the services of the Applicant does not, however, mention the conduct of the Applicant at the workplace as having any

influence in the decision to terminate his services. This letter, dated 21 September, 2009, only makes mention of the increasing cost of raw materials, the poor economic environment in which the company was operating and the lowered profitability levels as having influenced the decision to terminate the Applicant's services forthwith. It makes no mention of the Applicant's alleged obstructive conduct and him being not a team player.

64. Interestingly as well, under examination in chief by the Respondent's representative on whether he (Borrageiro) had informed the Applicant that Newman was the new Production Manager, witness Borrageiro stated that he was not too sure of whether he had said it or not, further qualifying his response by stating that it may well have been that *'…we were thinking of giving him (Newman) a role…he did eventually take a role in the company.'* And under cross examination by the Applicant's representative he confirmed having called both the Applicant and Newman Ngconga to a meeting in his office where he introduced this Newman Ngconga to the Applicant as the new Production Manager. Further to this, Borrageiro also instructed Newman to show the Applicant changes that he (Newman) had made around the plant, so that he could understand how the plant now worked.

65. The Court finds it quite astonishing that all this was done on the very same day the Applicant's services were terminated. Why was it even necessary to have the Applicant shown the changes made by Newman if he was going to be retrenched after all? More astounding was Borrageirro's assertion that when the Applicant reported back to work after the month long leave, and as he was being shown these changes, the decision to retrench him not been made. Apparently the decision was made later that morning, a clear indication that there was no consultation at all on the impending retrenchment of the Applicant. Borrageiro even went to the extent of likening the ultimate decision to retrench Mr. Hough to a game of chess where the players have to decide on the consequences of their next move. How appalling that such a drastic decision to terminate the Applicant's services could be likened to playing a game of chess! The Court was left to wonder as to why then his terminal benefits were not paid if indeed this was a genuine retrenchment?

66. Employees to be retrenched need to be afforded a fair opportunity to make meaningful proposals to the decision to terminate them. And implicit in the requirement of a fair opportunity is the duty to give them reasonable notice of same. Such notice must allow them time and space to absorb the shock brought about by the daunting prospect of losing their jobs. Retrenchment employees must be afforded the opportunity to come to terms with the

situation, reflect on it, seek advice and prepare for consultation and only then can a fair and genuine consultation process begin. The Court points out that this duty to engage in a meaningful and genuine consultation process is owed to all employees from the lowest to the executive level, and that the final decision to retrench must be informed by what transpired during the consultation. Consultation becomes an integral part of the process leading to the final decision on whether or not retrenchment is inescapable.

67. The function of the Court in scrutinizing the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision but to pass judgment on whether such a decision was genuine and not merely a sham. The Court's function is not to decide whether the employer made the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process. (See ***SA Clothing & Textile Workers Union & Others v Discreto (1998) 19 ILJ 1451 at 1454 I - J*)**.

68. In essence, the doctrine of unfair dismissal in Industrial relations is to protect employees against arbitrary termination of their services. That is, the termination of services or dismissal without substantive grounds and in a procedurally unfair manner. The case of the present Applicant before is a

classic case of unfair dismissal. The Respondent employer in this matter, USA Distillers (Pty) Ltd, felt that it no longer needed the services of Mr. Bernard Hough because he was apparently obstructive and decided to disguise his dismissal as a retrenchment. In all fairness, the evidence before this Court clearly indicates that the Applicant played no part in the final decision to have him terminated under retrenchment and that, and as confirmed by Borrageiro, he was replaced by Newman Ngconga. Taking into account all the circumstances of the case, the Court finds that it was unreasonable and unfair for the Respondent to terminate the services of the Applicant.

69. The Applicant is now 55 years old and is currently unemployed. He has had to cash in all his retirement funds in order to survive. The last of these retirement funds he has had to cash in recently to finance this case. Compounding matters in his quest for alternative employment is the fact that USA Distillers, through its Operations Director – Luis Borrageiro – refused to renew his reference letter because he had filed this unfair dismissal claim against it in this Court. The Court has also considered the evidence before it in respect of the Applicant's monthly remuneration and is convinced that indeed the Applicant was remunerated at the rate of E40,000 (Forty thousand emalangeni) per month. For purposes of calculating his terminal benefits the Court will use 2004 as his year of

employment, since the evidence indicates that he was terminated in May 2003 and re-employed in January 2004.

70. Taking into account all the evidence and circumstances of the case, the Court accordingly makes the following order;

a) The termination of the Applicant's services by the Respondent was both procedurally and substantively unfair.

b) The Respondent is hereby ordered and directed to pay the Applicant as follows;

i)	***Additional Notice Pay***	***E 29,088.00***
ii)	***Severance Allowance***	***E 72,720.00***
iii)	***10 months Compensation***	***E 400,000.00***
	Total :	***E 501,808.00***

71. The payment aforementioned is to be made within 30 days hereof. The Court also makes an order that the Respondent pays the Applicants costs.

The members agree.

T. A. DLAMINI

JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 15th DAY OF JULY 2014.

For the Applicants : ***Attorney L.R. Mamba (L.R. Mamba and Associates).***
For the Respondent: ***Attorney Z.D. Jele (Robinson Bertram Attorneys).***