IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 273/2012**

In the matter between:

THANDI KUNENE 1st Applicant
MAKHOSANDILE VILAKATI 2nd Applicant
DAVID MDLOVU 3rd Applicant

and

SWAZI MTN LIMITED Respondent

Neutral citation: *Thandi Kunene & 2 Others v Swazi MTN Limited (273/2012) [2016] SZIC 54 (November 18, 2016)*

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and P. Mamba
Nominated Members of the Court)

Heard submissions : 02/11/16

Delivered judgement: 18/11/16

Summary---Applicants dismissed by the Respondent on grounds of redundancy---Applicants challenged the dismissals arguing that it was substantively and procedurally unfair.

Held---The dismissals were substantively unfair as there was no evidence that the Respondent offered the Applicants lower level positions and the Applicants rejected them.

Held further---The dismissals were procedurally unfair as the Applicants were dismissed before the Respondent had considered their appeals after it had given them the platform to appeal to select committee.

JUDGEMENT

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1. This is an application for determination of an unresolved dispute in terms of Section 85 (2) of the Industrial Relations Act No.1 of 2000 as amended and the Rules of this Court.

2. The three Applicants are former employees of the Respondent. The Applicants had their services terminated on 30th June 2011 for reasons of redundancy as a result of a restructuring exercise by the Respondent.

3. The Applicants were not satisfied with the Respondent's decision to terminate their services. They reported the matter to the Conciliation, Mediation and Arbitration Commission (CMAC) as a dispute. The dispute could not be resolved by conciliation hence they instituted the

present legal proceedings for the determination of the unresolved dispute by the Court.

4. On the pleadings the Applicants case in summary is that:

4.1 Their dismissal was unlawful and unfair both substantively and procedurally, and it was unreasonable in all the circumstances because;

4.1.1 The Respondent has not ceased to carry on the activities in which the Applicants were employed.

4.1.2 The new structure adopted by the Respondent was not a product of mutual consultation but was imposed by the Respondent.

4.1.3 There was no proper consultation. The Respondent unilaterally concluded that the Applicants were not suited to the new positions.

4.1.4 The new structure was approved by the Respondent's Board in November 2010 prior to consultations.

4.1.5 The termination of the Applicants on 30th June 2011 was effected prior to the outcome of the appeals lodged with the Board, which means the appeals were ignored.

5. The Respondent pleaded its defence as follows in summary;

5.1 The Respondent restructured its business with the result that the positions occupied by the Applicants were abolished.

5.2 The termination of the Applicants' services was fair and reasonable in all the circumstances and was in terms of the law.

5.3 The employer required different skills in the new positions and the Applicants could not be accommodated in the new structure.

5.4 The Applicants were consulted after they had elected to represent themselves instead of the MTN Staff Association.

6. **MATERIAL FACTS:-**

The Respondent is part of MTN Group. The Group Corporate structure is divided into three categories. There is Tier 1 which is composed of the big operators like Nigeria and South Africa. There is Tier 2 which is composed of mid-size operators like Cameroon. Lastly, there is Tier 3 which are small size operators like Swaziland and Rwanda. When it was established the Respondent had a ten-year monopoly status. The ten-year period has since lapsed and the Respondent will henceforth have to face competition in the telephony industry in the country. In order for the Respondent to gear itself for competition, it decided to restructure its operations. The restructuring exercise resulted in four employees being unable to be accommodated

in the new positions. One of the employees accepted an exit package and left. The three did not accept the exit packages offered and they were thus terminated on the grounds of redundancy. The three employees are the three Applicants now before the Court.

7. **THE LAW:-**

The decision to engage in a restructuring exercise is a management prerogative. There are various reasons that may cause employers to restructure their businesses. These include, *inter alia*, a drop in demand for products or services, the introduction of new technology which makes production less labour intensive, reorganization, or the introduction of more productive and cost-efficient work methods. **(See:- Grogan J, Workplace Law, 8th edition, page 221).** All that the law or the Court require is that the employer must have a *bona fide* reason to retrench, or put differently, the retrenchment must be rationally justifiable. The employer must consult the employees or their representatives. If the employer intends to retrench five or more employees, the employer is required to follow the provisions of **Section 40 (2) of the Employment Act N0.5 of 1980 as amended**.

8. **THE RESTRUCTURING PROCESS:-**

In the present case the Respondent witnesses told the Court that there was a need to undertake the exercise because two main reasons, namely; to position the Respondent for competition and to align the Respondent with Tier 3 operations. As the result of the exercise several job categories were affected. These included jobs in which the Applicants were employed. Overall, there were job categories that were not affected at all. There were job categories that were affected only in respect of the reporting lines. There were also job categories that became redundant and new positions created. The jobs that were held by the Applicants fell into the category of the jobs that were abolished and new positions with new qualifications were created. The Applicants could not meet the new job requirements hence they were retrenched.

9. **ISSUES FOR DETERMINATION:-**

The first issue for the Court to determine is whether or not there was a genuine reason or rationale for the restructuring exercise. The Respondent's witnesses told the Court that there was a need to restructure in order to align the Respondent's operations with the rest of the Tier 3 operations of the MTN Group. The Respondent's witnesses also told the Court that there was a need to restructure in order to streamline the operations of the Respondent for efficient service in readiness for the impending competion in the telephony

industry as the Respondent's monopoly status was coming to an end. This evidence was not disputed by the Applicants. The Court will therefore come to the conclusion that the Respondent had a genuine reason to engage in the restructuring exercise. It was therefore justified in engaging in the process of restructuring.

10. The second issue is whether or not the restructuring exercise was carried out fairly such that the retrenchment of the Applicants could be said it was substantively and procedurally fair. Substantively, the retrenchment of the Applicants will be held to have been fair if it is shown by the Respondent that it was a measure of last resort and could not be avoided. ***(See: CWIU and Others V. Algorax (PTY) Ltd (2003) 11 BLLR 1081 (LAC).*** In paragraph 69 of this judgement the Court pointed out that;

"Whether the dismissal is fair or not is a question which must be answered by the Court and the Court must not defer to the employer for purposes of answering that question…"

11. Although the Court in the ***CWIU*** case (supra) was dealing with Section 189 (2) and (3) of the Labour Relations Act of South Africa, the *dictum* is highly persuasive, there is no reason why it cannot be adopted by the Court in the present case. The *dictum* is also more applicable to the present case as it is a no fault dismissal. The 1st Applicant was employed as Procurement and Warehouse Manager. A

new position was created called Supply Chain which now has an added responsibility of Fleet Management. New academic qualifications were set for the new position which the 1st Applicant did not have. She said she applied for the position of Buyer but was not successful. RW1 told the Court that the skills gap was too wide and they needed someone to fill the position immediately.

12. From the evidence before the Court, the "new" positions were not very different from the abolished ones. It is either that the scope was widened, or the scope was restricted because of new technology and new or higher qualifications required. There was no evidence that the Respondent did offer lower positions and the Applicants refused to take them. RW1 said lower positions were not offered because the Applicants were senior employees and management was looking for similar or lateral positions. RW1 said some applied for lower positions that were advertised but were not successful. During cross examination RW1 agreed that in the process of the restructuring about twenty new employees were hired. He said the Respondent managed to do that because it was not having financial problems but it was upgrading its operations as technology evolves at a fast pace. He said at no stage did any of the Applicants say they would accept a lower level position.

13. There was no evidence that the Respondent did offer junior positions in order to avoid retrenchment and the Applicants declined to accept the offer. The fact that the 1st Applicant applied for the lower position

of Buyer showed that she was prepared to take a lower level employment.

14. There was evidence that part of the IT function was moved to Uganda. It necessarily follows that if it was part of the IT division that was relocated to Uganda, there was a part of that division that remained. There was no evidence that the Respondent did offer the 2nd Applicant a position in the lower levels of the remaining IT division and he refused to take it and that the Respondent therefore had no other alternative but to retrench him.

15. The 3rd Applicant was employed as Service Centre Manager. The new position is now called Customer Experience and Training. He applied for other positions but was unsuccessful. The evidence by the 3rd Applicant that the Respondent still operates Service Centres in Manzini and Mbabane was not disputed.

16. In the light of this evidence, the Court is unable to come to the conclusion that the dismissal of the Applicants was substantively fair because;

16.1 there was no evidence that the Respondent offered lower level positions to the Applicants in order to avoid their retrenchment and the Applicants refused to take the offers leaving the Respondent with no other option except to retrench them.

16.2 although new positions were created, the core duties and/or components of the old jobs were still there which means that it was

possible to place the Applicants in lower levels of the new positions or in other departments taking into account the skills and work experience that the Applicants already had.

16.3 the Applicants were made to apply and compete for the available positions. This conduct by the Applicants clearly showed that they were prepared to take junior positions in order to avoid the retrenchment.

16.4 taking into account the fact that the Respondent was able to hire new employees, and taking into account the work experiences of the Applicants and also taking into account that the Respondent did not offer alternative lower level positions and the Applicants refused to accept these, it cannot be said that the dismissals could not be avoided.

16.5 from the evidence before the Court it was clear that there was no commitment by the Respondent to redeploy the Applicants in lower positions. This was confirmed by the evidence of RW1 during cross examination when he was asked if lower positions were offered. RW1told the Court that lower positions were not offered because the Applicants were senior employees and that management was looking for similar positions. When probed further on this issue, RW1 told the Court that *"No, our view was that they were at middle management level. We were looking at lateral levels. At no stage did any of them say they would take a lower level employment."*

17. The third issue is whether the dismissals were procedurally fair. The evidence revealed that part of the consultation process took place when the Applicants were already at home. There were letters written to the Applicants on 18th April 2011 advising them to take a leave of absence. All the minutes of consultations with the Applicants that were produced in Court showed that these took place after 18th April 2011 when the Applicants were already at home on special leave. RW1 told the Court that although the Applicants were at home, they were still employees of the Respondent and they received their salaries for that period.

18. The evidence revealed that this conduct of the Respondent of granting the Applicants the leave of absence made the Applicants to believe that the Respondent was not engaging them in good faith. RW1 assured the Applicants that the leave was granted in good faith. RW1 told them that the Respondent did that because it did not want to embarrass them by reporting to work when there was nothing for them to do, and that the special leave was meant to protect their professional images.

19. The Court will agree with the Applicants' argument that there was no commitment by the Respondent to retain the Applicants in employment and that the environment within which the process was taking place was not conducive as the Applicants were already at home on special leave. The Court also agrees with the Applicants argument because there is nowhere in the minutes where the Respondent made an offer to the Applicants to take lower level

positions in order to avoid losing their jobs. In these circumstances the Court is unable to come to conclusion that the consultations were fairly carried out. Further, the evidence revealed that the Applicants were dismissed before the Human Resources & Remunerations Committee rendered its decision on their appeal. RW1 argued that the appeal was just a kind gesture by the Respondent, it was not a legal requirement. Even if there was no legal requirement for the Applicants to appeal, the Respondent decided to grant the Applicants the option to appeal. The Applicants expected the Respondent to consider their appeals. They expected the Respondent to take them seriously and consider their appeals. The conduct of the Respondent to allow the Applicants to appeal the retrenchment decision and thereafter dismiss them before the appeals were considered also buttresses the Applicants' argument that the Respondent was not negotiating in good faith.

20. The fourth issue for determination is whether or not the 2nd Applicant was head hunted by the Respondent. We agree with the Respondent that whether the 2nd Applicant was headhunted or not has no impact on the fairness or unfairness of the retrenchment. There was no evidence that the Respondent knew or ought to have known that it will restructure soon after his engagement. The evidence revealed that the 2nd Applicant was called by an employee of the Respondent by the name of Shaka Ndlangamandla after the deadline for receiving applications for the advertised job and told him to submit his Curriculum Vitae (CV). The 2nd Applicant did so. He was called for interview and was offered the job. There was no evidence that the 2nd

Applicant filed an application letter for the job. He was only called by the Respondent employee and told to submit his CV. There is no doubt to the Court that the manner that the 2nd Applicant was employed by the Respondent have all the features of headhunting. Headhunting has been defined by the **Concise Oxford Dictionary of Current English, 5th edition, p. 625** as meaning the practice of filling a (usually senior) business position by approaching a suitable person employed elsewhere.

21. From the evidence before the Court there is no doubt that the 2nd Applicant was headhunted from his previous employer, the Swaziland Electricity Company (SEC) to join the Respondent and he duly accepted the appointment.

22. In the circumstances of this case, and taking into account all the evidence and submissions by the parties; the Court will come to the conclusion that the dismissal of the Applicants was substantively and procedurally unfair.

23. **RELIEF:-**

The Applicants applied for reinstatement or compensation in the alternative. The 1st and 3rd Applicants were paid their statutory packages. Only the 1st Applicant is now employed. The Applicants having been dismissed about five years ago, it will clearly not be practical to have them re-instated. The 1st Applicant had been employed for about ten years without any disciplinary record. The 2nd

Applicant had been employed for only one year and two months. The 3rd Applicant had been employed for about twelve years. The Applicants did not have any disciplinary record. The Court will take into account that although the 2nd Applicant had served the Respondent for only fourteen months, he was headhunted from his previous employment. He told the Court that he was now regretting his act of leaving his previous employment. The 2nd Applicant had not completed two years in service. He is therefore not entitled to additional notice and severance allowance. Having finished twelve months, he is entitled to leave pay. The loss of employment through no fault of their own had a deleterious impact on the lives of the Applicants and their families.

24. Taking into account all the personal circumstances of the Applicants, the Court will make an order that the Respondent pays the following amounts to the Applicants.

1. 1st Applicant, compensation (E26, 739.75 x 10) **= E267,397.50**

2. 2nd Applicant:

Notice pay	= E 37, 659.74
Leave pay	= E 26, 068.05
Compensation(E37, 659.74 x 8)	= E 301,277.92
Total	**= E365,005.71**

3. 3rd Applicant, compensation (E27,166.70 x 10) = **E271,667.00**

25. The Respondent is to pay the costs of suit.

The members agree.

N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANTS : **MR. M.P. SIMELANE**
(M P SIMELANE ATTORNEYS)

FOR RESPONDENT : **ADV. A SNIDER**
(INSTRUCTED BY MUSA M SIBANDZE ATTORNEYS)